

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE) C-11-02509 LHK
ANTITRUST LITIGATION,)
) SAN JOSE, CALIFORNIA
)
) JANUARY 26, 2012
)
-----)
) PAGES 1-69
THIS DOCUMENT RELATES TO:)
ALL ACTIONS)
-----)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LUCY H. KOH
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFFS: LIEFF, CABRASER,
HEIMANN & BERNSTEIN
BY: JOSEPH R. SAVERI,
KATHERINE M. LEHE, AND
DEAN M. HARVEY
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APPEARANCES CONTINUED ON NEXT PAGE

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SAN JOSE, CALIFORNIA

JANUARY 26, 2012

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE
FOLLOWING PROCEEDINGS WERE HELD:)

THE CLERK: CALLING CASE NUMBER
C-11-02509 LHK, IN RE: HIGH-TECH EMPLOYEE ANTITRUST
LITIGATION.

MR. SAVERI: GOOD AFTERNOON, YOUR HONOR.
JOSEPH SAVERI, LIEFF, CABRASER, HEIMANN & BERNSTEIN
ON BEHALF OF THE PLAINTIFFS.

THE COURT: OKAY. GOOD AFTERNOON.

MR. CRAMER: GOOD AFTERNOON, YOUR HONOR.
ERIC CRAMER FROM BERGER & MONTAGUE FOR PLAINTIFFS.

THE COURT: OKAY. GOOD AFTERNOON.

MR. HARVEY: DEAN HARVEY OF LIEFF
CABRASER FOR THE PLAINTIFFS.

THE COURT: OKAY. GIVE ME JUST ONE
SECOND TO MAKE SURE I GET EVERYONE.

OKAY. I'M SORRY. I DIDN'T CATCH,
MR. CRAMER, WHO YOU'RE REPRESENTING.

MR. CRAMER: PLAINTIFFS.

THE COURT: OH, OKAY. THANK YOU. OKAY.

MR. HARVEY: THAT WAS DEAN HARVEY OF
LIEFF CABRASER FOR THE PLAINTIFFS.

THE COURT: OKAY. WELCOME.

1 MR. RADICE: JOHN RADICE OF GRANT &
2 EISENHOFER ON BEHALF OF THE PLAINTIFFS.

3 THE COURT: OKAY. WELCOME.

4 MS. LEHE: KATHERINE LEHE, LIEFF
5 CABRASER, FOR PLAINTIFFS.

6 THE COURT: OKAY. WELCOME.

7 MR. SAVERI: AND, YOUR HONOR,
8 MR. MICHAEL DEVINE, ONE OF OUR PLAINTIFFS, IS HERE
9 TODAY, AND I WANTED TO INTRODUCE HIM TO YOU.

10 THE COURT: OKAY. WELCOME.

11 ALL RIGHT.

12 MR. RILEY: GOOD AFTERNOON, YOUR HONOR.
13 GEORGE RILEY OF O'MELVENY & MYERS. I REPRESENT
14 APPLE.

15 I'M JOINED BY MY COLLEAGUE,
16 MICHAEL TUBACH, FROM O'MELVENY & MYERS.

17 MR. MITTELSTAEDT: GOOD AFTERNOON, YOUR
18 HONOR. BOB MITTELSTAEDT FOR ADOBE.

19 THE COURT: OKAY. WELCOME.

20 MR. STEWART: CRAIG STEWART, YOUR HONOR,
21 FOR INTUIT.

22 THE COURT: OKAY. ONE SECOND. WELCOME.

23 MR. RUBIN: GOOD AFTERNOON, YOUR HONOR.
24 LEE RUBIN FROM MAYER BROWN FOR GOOGLE.

25 THE COURT: OKAY. WELCOME.

1 MR. HINMAN: FRANK HINMAN, YOUR HONOR,
2 WITH BINGHAM MCCUTCHEN REPRESENTING INTEL.

3 THE COURT: OKAY. WELCOME.

4 MR. PURCELL: YOUR HONOR, DAN PURCELL OF
5 KEKER & VAN NEST REPRESENTING LUCASFILM.

6 THE COURT: OKAY. ONE SECOND. WELCOME.

7 MS. HENN: YOUR HONOR, EMILY HENN OF
8 COVINGTON & BURLING REPRESENTING PIXAR.

9 THE COURT: OKAY. WELCOME.

10 MS. GARZA: YOUR HONOR, DEBORAH GARZA,
11 COVINGTON & BURLING, ALSO HERE ON BEHALF OF PIXAR.

12 MR. TUBACH: I'VE ALREADY BEEN
13 INTRODUCED, YOUR HONOR. I'M MICHAEL TUBACH. I'M
14 WITH GEORGE RILEY.

15 THE COURT: OKAY. THANK YOU. THANK YOU
16 FOR YOUR PATIENCE.

17 LET'S -- I HAVE SOME QUESTIONS FOR THE
18 MOTION AND THEN WE'LL HANDLE THE CMC PART.

19 ALL RIGHT. LET ME ASK MR. SAVERI, I
20 THINK THAT THE BILATERAL AGREEMENTS DO STATE A
21 SHERMAN ACT CLAIM.

22 I'M STILL NOT CONVINCED THAT THERE'S AN
23 OVERARCHING CONSPIRACY THAT THE DIFFERENT
24 PLAYERS -- AND BY THAT I MEAN THE DIFFERENT
25 COMPANIES -- WERE AWARE THAT THIS WAS SORT OF AN

1 INDUSTRY-WIDE PRACTICE.

2 AND SO LET ME ASK YOU, WOULD YOU BE
3 OPPOSED TO BREAKING THIS UP INTO SMALLER CHUNKS?
4 AND IF YOU DID, HOW WOULD YOU DO IT?

5 EITHER WAY, EVEN IF I WERE TO GRANT THE
6 MOTION TO DISMISS ON THIS ISSUE, I WOULD GIVE YOU
7 LEAVE TO AMEND SO THEN YOU COULD ADD IN ADDITIONAL
8 FACTUAL ALLEGATIONS IF YOU WANTED TO CONTINUE TO
9 PURSUE THE OVERARCHING CONSPIRACY.

10 WHY DON'T YOU COMMENT ON THAT?

11 MR. SAVERI: WELL, FIRST -- THANK YOU,
12 YOUR HONOR.

13 FIRST, AT THIS JUNCTURE, ALL OUR BURDEN
14 UNDER RULE 8 AND RULE 12 AND TWOMBLY IS IS TO STATE
15 A CLAIM AGAINST THE DEFENDANTS.

16 THE COURT: UM-HUM. OKAY.

17 MR. SAVERI: IT'S NOT -- AND OUR CLAIM IS
18 FOR A CONSPIRACY TO LIMIT OUR CLASS MEMBERS'
19 MOBILITY WITH RESPECT TO THEIR EMPLOYMENT, AND
20 GENERALLY TO LIMIT AND REDUCE THE WAGES THAT WERE
21 PAID BY THE DEFENDANTS TO OUR CLASS MEMBERS.

22 THE COURT: SO YOUR POSITION IS, AS LONG
23 AS YOU'VE STATED A CLAIM AS TO THE BILATERAL
24 AGREEMENTS, THAT'S ENOUGH?

25 MR. SAVERI: UNDER RULE 8 AND RULE 12 FOR

1 PLEADING PURPOSES.

2 AT THE -- AT THE END --

3 THE COURT: WHAT ABOUT NOTICE PURPOSES TO
4 THE DEFENSE?

5 MR. SAVERI: WELL, CLEARLY I THINK THEY
6 HAVE NOTICE OF WHAT OUR CLAIM IS, AS YOU
7 CHARACTERIZED IT, AN OVERARCHING CONSPIRACY.

8 THERE'S REALLY NO -- THERE'S REALLY NOT
9 GOING TO BE ANY DISPUTE TODAY ABOUT WHETHER WE'VE
10 ALLEGED AN OVERARCHING CONSPIRACY, IF THAT'S THE
11 NOMENCLATURE WE'RE GOING TO USE, AND WHO -- AND
12 WHAT THE MATERIAL TERMS OF THAT ARE.

13 DEFENDANTS HAVE ARGUMENTS ABOUT WHY IT
14 DIDN'T HAPPEN, OR PERHAPS LIMITATIONS TO IT,
15 PERHAPS WHEN ONE PARTY ENTERED IT OR ONE PARTY
16 EXITED, OR PERHAPS THE EFFECT.

17 WE THINK ALL THOSE ARGUMENTS ARE
18 INCORRECT. WE THINK THEY'RE UNTENABLE UNDER THE
19 LAW AND THE FACTS.

20 BUT WE THINK THOSE ARE ISSUES THAT SHOULD
21 BE RESOLVED ONCE WE'VE HAD AN OPPORTUNITY TO TAKE
22 THE DEPOSITIONS AND LOOK AT THE DOCUMENTS.

23 BUT FOR PURPOSES OF TODAY --

24 THE COURT: UM-HUM.

25 MR. SAVERI: -- WHAT WE NEED TO DO IS

1 DETERMINE, UNDER RULE 8, AS INTERPRETED BY TWOMBLY,
2 WHETHER THE PLAINTIFFS HAVE STATED A CLAIM UNDER
3 OUR FOUR CAUSES OF ACTION: UNDER THE FEDERAL
4 ANTITRUST LAW; UNDER THE STATE ANTITRUST LAW; UNDER
5 THE CALIFORNIA UNFAIR COMPETITION LAW; AND UNDER
6 SECTION 16600, ANOTHER STATE STATUTE.

7 THE COURT: UM-HUM.

8 MR. SAVERI: SO, YOUR HONOR, WE HAVE
9 STATED A CLAIM.

10 IN FACT, THE DEFENDANTS HAVE AGREED THAT
11 THESE BASIC ALLEGATIONS, AT LEAST WITH RESPECT TO
12 WHAT WE'RE CALLING THE BILATERAL AGREEMENTS, ARE
13 SUFFICIENT TO STATE A CLAIM, AND THAT'S WHAT THEY
14 AGREED TO WITH THE GOVERNMENT.

15 AND I'M NOT A BIG FAN OF ESTOPPEL
16 ARGUMENTS, BUT HERE I THINK WE ACTUALLY DO HAVE A
17 PRETTY STRONG ONE BECAUSE THE DEFENDANTS, IN FACT,
18 ON ALLEGATIONS -- ON THESE ALLEGATIONS, WHICH THEY
19 SAY WE COPIED FROM THE FEDERAL CASE, THEY'VE AGREED
20 THAT WE STATED A CLAIM UNDER SECTION I OF THE
21 SHERMAN ACT.

22 IN FACT, THE ONLY THING DEFENDANTS SAY IN
23 RESPONSE TO THAT IS THAT THE RULES OF ESTOPPEL
24 DON'T APPLY BECAUSE THIS IS A SEPARATE PIECE OF
25 LITIGATION, AND THEY NEGLECT A NINTH CIRCUIT CASE

1 THAT THEY DON'T CITE.

2 BUT EVEN, EVEN IF YOU -- YOUR HONOR, EVEN
3 IF YOU TAKE THE ESTOPPEL POINT AWAY, WE SAY THAT WE
4 HAVE SHOWN, UNDER TWOMBLY, A PLAUSIBLE OVERARCHING
5 CLAIM, AND THAT IS -- FIRST I'D LIKE TO MAYBE JUST
6 TOUCH FOR A MINUTE ABOUT WHAT PLAUSIBILITY MEANS IN
7 THIS CONTEXT.

8 PLAUSIBILITY DOESN'T MEAN WE PROVE OUR
9 CLAIMS HERE, OBVIOUSLY.

10 THE COURT: WELL, LET ME INTERRUPT YOU
11 FOR A MINUTE.

12 SO IF I LOOK AT PARAGRAPHS 55 AND 108 OF
13 YOUR COMPLAINT, I'M ASSUMING THAT, FROM THOSE
14 PARAGRAPHS, YOU WANT AN INFERENCE TO BE DRAWN THAT
15 THIS WAS A CONSPIRACY, THAT ALL THE COMPANIES THAT
16 ARE ON THE CHART ON PAGE 18 WERE AWARE OF WHAT
17 EVERYONE ELSE WAS DOING.

18 MR. SAVERI: UM -- I'M SORRY.

19 THE COURT: AND I'M JUST SAYING, JUST --
20 I THINK THERE ARE PIECES OF THAT CHART THAT I THINK
21 THAT INFERENCE CAN BE DRAWN, BUT I'M NOT CONVINCED
22 THAT LUCASFILM WAS AWARE OF THE INTUIT AGREEMENT,
23 OR ADOBE WAS AWARE OF THE INTEL AGREEMENT.

24 I MEAN, I CAN SEE YOUR POINT THAT PERHAPS
25 ON THE SORT OF APPLE SIDE OF THE EQUATION, THAT

1 THERE PROBABLY WAS MORE KNOWLEDGE THAT OTHER
2 COMPANIES WERE ALSO HAVING THESE BILATERAL
3 AGREEMENTS.

4 BUT TELL ME WHY I CAN DRAW THAT INFERENCE
5 FROM LUCASFILM AND INTUIT OR ADOBE AND INTEL.

6 MR. SAVERI: THANK YOU, YOUR HONOR.

7 WE -- I WOULD SAY THAT WHEN YOU LOOK AT
8 THE ALLEGATIONS OF OUR COMPLAINT AND WHEN YOU LOOK
9 FOR PLACES WHERE WE ALLEGE FACTS FROM WHICH WE SAY
10 YOU SHOULD DETERMINE THAT OUR ALLEGATIONS ARE
11 PLAUSIBLE, IT IS PARAGRAPH 55, WHICH YOU REFERRED
12 TO, BUT THERE ARE OTHER ALLEGATIONS IN THE
13 COMPLAINT.

14 THE COURT: OKAY.

15 MR. SAVERI: LET ME TRY TO WALK YOU
16 THROUGH THEM AND IDENTIFY THEM.

17 THE FIRST OF THEM ARE THE EXTENSIVE
18 ALLEGATIONS REGARDING THE BILATERAL AGREEMENTS
19 THEMSELVES.

20 THE COURT: UM-HUM.

21 MR. SAVERI: THOSE AGREEMENTS ARE DIRECT
22 EVIDENCE OF THE CONSPIRACY. THOSE ARE POWERFUL
23 AND, IN MY EXPERIENCE, REMARKABLE, REMARKABLY
24 SPECIFIC FACTUAL ALLEGATIONS.

25 WHAT'S -- AMONG OTHER THINGS, WHAT'S

1 IMPORTANT ABOUT THOSE ALLEGATIONS IS THE REMARKABLE
2 SIMILARITY IN THEIR BASIC ELEMENTS.

3 THEY ESSENTIALLY COVERED THE SAME TIME
4 PERIOD. SOME OF THEM STARTED AT DIFFERENT TIMES,
5 OBVIOUSLY.

6 BASED ON WHAT WE KNEW AT THE TIME OF THE
7 COMPLAINT, IT DOES LOOK LIKE THESE AGREEMENTS MAY
8 HAVE -- THE FIRST ONE WE KNOW ABOUT WAS THE
9 LUCAS/PIXAR, BUT WE -- AND WITH THE PASSAGE OF TIME
10 AND, FRANKLY, IT LOOKS LIKE THE INVOLVEMENT OF THE
11 PRINCIPALS AT APPLE, STEVE JOBS, AND GOOGLE, THESE
12 AGREEMENTS BECAME MORE COMMON.

13 THE TWO INDIVIDUALS, JOBS AND SCHMIDT AT
14 GOOGLE, WERE INVOLVED IN ALL SIX AGREEMENTS WE
15 ALLEGE.

16 WE SPECIFICALLY ALLEGE DEFENDANTS'
17 PATTERNED THEIR AGREEMENTS AFTER EACH OTHER'S.

18 WE SAY THAT THE -- AND I HAVE TO BE A
19 LITTLE BIT CAREFUL HERE BECAUSE WE --

20 THE COURT: OKAY. HOW WAS STEVE JOBS
21 INVOLVED IN THE GOOGLE/INTEL AGREEMENT OR THE
22 GOOGLE/INTUIT AGREEMENT?

23 MR. SAVERI: WE -- IT -- WELL, HE IS
24 INVOLVED BECAUSE HE WAS INVOLVED WITH MR. SCHMIDT
25 AND OTHER PEOPLE AT GOOGLE.

1 AND THAT AGREEMENT BETWEEN APPLE AND
2 GOOGLE, WHICH IS SIMILAR TO PRIOR AGREEMENTS WITH
3 LUCASFILM AND PIXAR AND OTHER AGREEMENTS, WE SAY
4 WAS -- WAS COPIED, ADOPTED, AND SPREAD.

5 NOW, THE DEFENDANTS' CLAIM, I GUESS, IS
6 THAT DESPITE THE COMMONALITY OF ALL THESE
7 AGREEMENTS, THEY'RE ASKING YOU TO SUSPEND DISBELIEF
8 AND IGNORE YOUR COMMON SENSE AND TO SAY THAT
9 DESPITE THE FACT THAT ALL THESE AGREEMENTS WERE
10 ESSENTIALLY THE SAME, THEY HAD NOTHING TO DO WITH
11 ONE ANOTHER.

12 AND SO WE SAY THAT OUR ALLEGATIONS THAT
13 THESE AGREEMENTS WERE, WERE COMMON IN THEIR BASIC
14 TERMS AND CONDITIONS AND SPREAD THROUGHOUT THIS
15 INDUSTRY PLAUSIBLY SUGGESTS THAT THESE AGREEMENTS
16 WERE REACHED AS PART OF A COMMON UNDERSTANDING AND
17 A COMMITMENT TO A COMMON PURPOSE, WHICH -- AND THE
18 COMMON PURPOSE IS THE CONSPIRACY TO ELIMINATE
19 MOBILITY AMONGST OUR CLASS MEMBERS AND TO REDUCE
20 AND SUPPRESS WAGES.

21 OF COURSE --

22 THE COURT: MAY I INTERRUPT YOU A SECOND?

23 LET ME ASK -- LET ME ASK DEFENSE COUNSEL,
24 YOU DID -- YOU DID CONCEDE, WITH THE DEPARTMENT OF
25 JUSTICE, THAT THE BILATERAL AGREEMENTS, THE

1 ALLEGATIONS THAT THE DEPARTMENT OF JUSTICE MADE AS
2 TO THE BILATERAL AGREEMENTS DID STATE A SHERMAN ACT
3 CLAIM; CORRECT?

4 MR. RILEY: THE GOVERNMENT'S BURDEN WAS
5 DIFFERENT THAN THE PRIVATE PLAINTIFFS' BURDEN.

6 THE PRIVATE PLAINTIFFS MUST ALLEGE AND
7 PROVE ANTITRUST INJURY UNDER SECTION IV OF THE
8 CLAYTON ACT IN ORDER TO HAVE STANDING.

9 THE GOVERNMENT DID NOT HAVE THAT
10 REQUIREMENT.

11 THE COURT: OKAY. LET'S ASSUME -- I
12 UNDERSTAND.

13 MR. RILEY: OKAY.

14 THE COURT: LET'S ASSUME -- LET'S ASSUME
15 A HYPOTHETICAL. THERE IS ANTITRUST INJURY HERE.

16 IF THE BILATERAL AGREEMENTS THAT ARE
17 ALLEGED HERE, THERE'S NO COLLABORATION, THESE
18 AGREEMENTS ARE NOT TIED TO A COLLABORATION, THEY
19 ARE NOT LIMITED IN TERMS OF THE SCOPE OF EMPLOYEES
20 WHO ARE COVERED, THEY'RE NOT LIMITED AS TO TIME,
21 THEY'RE NOT LIMITED AS TO GEOGRAPHY, THIS IS NOT
22 PART OF A SALE, THEN YOU WOULD CONCEDE THAT IF IT
23 WERE JUST THESE BILATERAL AGREEMENTS AS ALLEGED IN
24 THIS CONSOLIDATED AMENDED COMPLAINT, AND ASSUMING
25 THERE WAS ANTITRUST INJURY, THEN THAT DOES STATE A

1 CLAIM FOR A SHERMAN ACT VIOLATION; CORRECT?

2 MR. RILEY: NO.

3 THE COURT: WHY?

4 MR. RILEY: BECAUSE MR. DEVINE, FOR
5 EXAMPLE, WAS AN EMPLOYEE OF ADOBE DURING THIS
6 PERIOD, ABOUT A YEAR AND A HALF.

7 MR. DEVINE, UNDER NO CONCEIVABLE SET OF
8 FACTS THAT HAVE BEEN ALLEGED, OR COULD BE ALLEGED,
9 WOULD HAVE ANY STANDING TO SUE WITH REGARD TO AN
10 ALLEGED BILATERAL AGREEMENT BETWEEN INTUIT AND
11 GOOGLE. IT HAS NOTHING TO DO WITH HIM. IT'S A
12 COMPLETELY SEPARATE RELATIONSHIP BETWEEN INTUIT AND
13 GOOGLE.

14 FURTHERMORE, WE WOULD CONTEND THAT THEY
15 HAVE NOT MET THEIR BURDEN TO SHOW PLAUSIBILITY
16 BECAUSE THERE IS AN OBVIOUS EXPLANATION FOR THESE
17 AGREEMENTS THAT HAS NOTHING TO DO WITH
18 ANTICOMPETITIVE BEHAVIOR, AND THAT IS THE
19 COLLABORATION THAT EXISTED BETWEEN THESE FIRMS.

20 THE COURT: OKAY. WHAT ABOUT
21 MR. BRANDON MARSHALL? DOES HE HAVE STANDING THEN?
22 HE WAS A SOFTWARE ENGINEER AT ADOBE.

23 WOULD YOU CONCEDE, ASSUMING THERE'S
24 ANTITRUST INJURY, THAT HE HAS STATED A CLAIM FOR A
25 SHERMAN ACT VIOLATION AS TO THE AGREEMENT BETWEEN

1 ADOBE AND APPLE, FOR EXAMPLE?

2 MR. RILEY: AGAIN, WE WOULD HAVE TO
3 ASSUME, CONTRARY TO WHAT'S IN THIS COMPLAINT,
4 BECAUSE IT'S NOT IN THIS COMPLAINT, THAT HE HAS
5 PROPERLY ALLEGED THAT THERE WAS AN EXISTENCE OF A
6 PLAUSIBLE AGREEMENT, AND THAT THAT AGREEMENT CAUSED
7 HIM ANTITRUST INJURY.

8 IN OTHER WORDS, IF WE MADE ALL OF THOSE
9 ASSUMPTIONS, THEN IF WE ASSUME THAT HE STATED A
10 CLAIM, HE WOULD BE STATING A CLAIM.

11 BUT THAT IS NOT THIS COMPLAINT. THEY
12 WOULD HAVE TO COMPLETELY REPLEAD THIS COMPLAINT IF
13 THEY WERE GOING TO ALLEGE INJURY CAUSED BY
14 INDIVIDUAL BILATERAL AGREEMENTS.

15 AND THE DIFFERENCE HERE, AND IT IS
16 ABSOLUTELY CRITICAL, IS THAT MR. DEVINE, JUST TO
17 USE HIM AS AN EXAMPLE, WANTS DAMAGES FROM INTUIT
18 AND GOOGLE FOR BEHAVIOR THAT HAD ABSOLUTELY NO
19 IMPACT ON HIM.

20 IN OTHER WORDS, THEY WANT JOINT AND
21 SEVERAL LIABILITY AMONG ALL THE ALLEGED
22 CO-CONSPIRATORS.

23 THE COURT: WELL, WHY DOES THAT -- I KNOW
24 YOU MAKE -- THE DEFENDANTS MAKE A POINT ABOUT THAT
25 A NUMBER OF TIMES, THAT THIS IS AN OVERARCHING

1 CONSPIRACY JUST FOR JOINT AND SEVERAL LIABILITY.

2 WHY DOES THAT MATTER? ALL OF THESE
3 COMPANIES HAVE VERY DEEP POCKETS. IF THE
4 PLAINTIFFS DECIDE, LOOK, WE WANT TO BREAK IT UP,
5 OKAY, FINE, WE'LL JUST GO AFTER THE TWO COMPANIES
6 IN A BILATERAL AGREEMENT AND WE'RE NOT WORRIED THAT
7 ANY OF THESE COMPANIES IS GOING TO BE JUDGMENT
8 PROOF AND WE'LL JUST GO AFTER EACH AGREEMENT AT A
9 TIME, SO WHY DOES IT MATTER WHETHER IT'S JOINT AND
10 SEVERAL LIABILITY OR JUST SEPARATE?

11 MR. RILEY: IT'S A HUGE DIFFERENCE.

12 THE COURT: WHY?

13 MR. RILEY: BECAUSE THIS CASE WILL LOOK
14 COMPLETELY DIFFERENT. THERE WILL BE DIFFERENT
15 CLASS DEFINITIONS AND THERE WILL BE DIFFERENT
16 DISCOVERY.

17 THEY WANT TO COME IN AND DISCOVER, SAY,
18 FROM APPLE, EVERYTHING ABOUT ALL OF ITS
19 RELATIONSHIPS WITH ALL OF THESE COMPANIES AS
20 OPPOSED TO JUST ITS RELATIONSHIP WITH ADOBE.

21 THE COURT: BUT IF THEY BREAK IT UP, THEY
22 COULD GET APPLE'S RELATIONSHIP WITH ADOBE, APPLE'S
23 RELATIONSHIP WITH PIXAR, APPLE'S RELATIONSHIP WITH
24 LUCASFILM.

25 I MEAN, EVEN IF IT'S A BROKEN UP CASE,

1 WE'RE ESSENTIALLY TALKING ABOUT THE SAME DISCOVERY.
2 I WOULD PROBABLY CONSOLIDATE ALL THE CASES ANYWAY
3 EVEN IF THEY WERE BROKEN UP.

4 MR. RILEY: BUT IT'S A VERY DIFFERENT
5 CASE AND IT'S A VERY DIFFERENT CLASS.

6 MR. DEVINE COULD NOT REPRESENT, FOR
7 EXAMPLE, EMPLOYEES OF INTUIT, HE COULDN'T, WHICH IS
8 WHAT HE IS PURPORTING TO TRY TO DO TODAY.

9 THE COURT: RIGHT. BUT DON'T YOU THINK
10 THEY COULD EASILY GO OUT AND FIND ONE FORMER
11 EMPLOYEE OF INTUIT TO SERVE AS A LEAD PLAINTIFF?

12 MR. RILEY: WELL, WITH THEIR ADVERTISING
13 CAPABILITY, THEY MAY BE ABLE TO DO THAT.

14 BUT THAT IS NOT THIS CASE. THAT'S NOT
15 THE FACTS THAT ARE ALLEGED IN THIS COMPLAINT, WHICH
16 IS THE SUBJECT OF THIS MOTION.

17 THE COURT: LET ME ASK MR. SAVERI, ARE
18 YOU ARGUING THAT BOTH THE INDIVIDUAL BILATERAL
19 AGREEMENTS THEMSELVES ARE SHERMAN ACT VIOLATIONS,
20 AND THEN YOUR OVERARCHING CONSPIRACY IS A SEPARATE
21 SHERMAN ACT VIOLATION?

22 MR. SAVERI: I DON'T THINK -- I DON'T
23 KNOW WHAT YOU MEAN BY "SEPARATE."

24 I MEAN, CERTAINLY OUR ALLEGATION IN THE
25 COMPLAINT IS THAT THEY ARE -- THE BILATERAL

1 AGREEMENTS ARE CLEAR. THE ALLEGATIONS -- THE
2 FACTUAL ALLEGATIONS ARE MORE THAN ENOUGH.

3 WE SAY THEY ARE CONNECTED TO THE BIGGER
4 CONSPIRACY BECAUSE THEY EVIDENCED THE
5 UNDERSTANDING, THEY MEMORIALIZED ASPECTS OF THE
6 UNDERSTANDING, THEY SHOW HOW THE GENERAL CONSPIRACY
7 SPREAD.

8 SO WE CAN'T CHOP THEM UP AND SEPARATE
9 THEM FROM THE BROADER CONSPIRACY WE ALLEGE.

10 I MEAN, WHAT WE JUST HEARD, I THINK, ONE
11 OUR -- I DON'T THINK IT'S AN ACCURATE RENDITION OF
12 THE ALLEGATIONS IN THE COMPLAINT.

13 BUT ULTIMATELY THOSE ARE FACTUAL ISSUES
14 ABOUT WHO -- WHAT -- TO WHAT EXTENT DID THE
15 DEFENDANTS THAT WE NAME SHARE A COMMITMENT TO THE
16 COMMON PURPOSE THAT I DISCUSSED?

17 I MEAN, THE -- WHICH IS THE, THE GENERAL
18 AGREEMENT TO LIMIT THE MOBILITY OF THE -- OF THEIR
19 EMPLOYEES AND TO REDUCE THE WAGES THAT THEY WERE
20 BEING PAID.

21 THE OTHER PROBLEM IS -- I JUST WANT TO
22 NOTE ANOTHER THING.

23 THE OTHER THING THAT'S IN COMMON, AND
24 WHAT I WOULD POINT TO TO SHOW THAT OUR ALLEGATIONS
25 OF THE GENERAL SINGLE CONSPIRACY ARE PLAUSIBLE, WAS

1 THE FACT THAT THE DEFENDANTS, IN FACT, CONCEALED
2 THESE AGREEMENTS BECAUSE I BELIEVE THEY KNEW THEY
3 WERE WRONG.

4 THE -- THAT'S ANOTHER FACT WHICH SHOWS
5 THAT THE GENERAL CONSPIRACY IS PLAUSIBLE.

6 I THINK THE OTHER THING WE SHOULD
7 REMEMBER IS THAT THE -- THIS ARGUMENT DEPENDS ON
8 MISUNDERSTANDING OR MISAPPLICATION OF THE GENERAL
9 LAW THAT APPLIES TO CONSPIRACY.

10 I MEAN, WE SHOULD BE CLEAR ABOUT WHAT THE
11 LAW OF CONSPIRACIES IN ANTITRUST CASES DOES AND
12 DOESN'T REQUIRE.

13 WE CITED SOME OF THE AUTHORITIES IN OUR
14 BRIEF, AND I WON'T REALLY GO THROUGH ALL OF THEM --

15 THE COURT: CAN I INTERRUPT YOU AND MOVE
16 ON?

17 MR. SAVERI: SURE.

18 THE COURT: LET'S MOVE ON.

19 MR. SAVERI: YEP.

20 THE COURT: SO FIRST OF ALL, I WANT TO
21 THANK YOU FOR WITHDRAWING YOUR PRAYER FOR
22 INJUNCTIVE RELIEF AS WE TALKED ABOUT AT THE LAST
23 CMC.

24 LET ME ASK YOU, WOULD YOU CONSIDER ALSO
25 WITHDRAWING AT LEAST YOUR PRAYER FOR DECLARATORY

1 RELIEF BECAUSE THERE'S NOT -- I DON'T KNOW IF YOU
2 CAN DEMONSTRATE THAT THE PLAINTIFFS ARE
3 REALISTICALLY THREATENED BY REPETITION OF THE
4 VIOLATION IN LIGHT OF THE FACT THAT THERE IS THIS
5 CONSENT DECREE, THERE IS THIS MONITORING TO THE
6 DEPARTMENT OF JUSTICE ANNUALLY.

7 I JUST THINK YOU'RE GOING TO HAVE A
8 DIFFICULT TIME SHOWING THAT.

9 SO WHAT'S YOUR VIEW?

10 MR. SAVERI: SO I TEND TO AGREE WITH YOU,
11 AND I THINK I'M GOING TO SAY TO YOU WHAT I SAID
12 LAST TIME, WHICH IS I TEND TO AGREE WITH YOU, BUT
13 I'D LIKE TO THINK A LITTLE AND CONSULT, AND I
14 THINK, AS WE DID THE LAST TIME, WE CAN REACT PRETTY
15 QUICKLY TO THAT.

16 THE COURT: SURE.

17 MR. SAVERI: OFF THE CUFF -- AND I'M
18 RELUCTANT TO DO THAT IN THIS KIND OF FORMAL
19 PROCEEDING --

20 THE COURT: YEAH.

21 MR. SAVERI: -- I THINK YOUR INSIGHT IS
22 PROBABLY RIGHT, THAT TO THE EXTENT THERE IS SOME
23 KIND OF PROTECTION FROM WHAT THEY DID WITH RESPECT
24 TO THE GOVERNMENT, I THINK THAT DOES, IN LARGE
25 PART, OBVIATE OR MOOT THE DECLARATORY RELIEF CLAIM.

1 THE COURT: OKAY. CAN YOU GIVE ME A
2 DATE, LIKE WE DID LAST TIME, BY WHICH YOU'RE EITHER
3 GOING TO SAY, "WE'VE THOUGHT ABOUT IT AND WE ARE
4 NOT DROPPING IT," OR YOU'RE DISMISSING IT?

5 MR. SAVERI: SURE. I THINK I WAS
6 PUNISHED BY MY COLLEAGUES FOR AGREEING TO SOMETHING
7 TOO QUICKLY LAST TIME, SO HOW ABOUT -- TODAY IS
8 THURSDAY. HOW ABOUT MONDAY?

9 THE COURT: IF YOU WANTED MORE TIME THAN
10 THAT, THAT WOULD BE FINE. BUT THAT WOULD BE GREAT.

11 MR. SAVERI: I THINK THE END OF THE DAY
12 MONDAY IS SOMETHING I CAN PROBABLY ACCOMPLISH.

13 THE COURT: THANK YOU. ALL RIGHT.

14 ALL RIGHT. LET ME -- ALL RIGHT. SO THAT
15 WOULD BE THE 30TH. OKAY. AND THAT'S EITHER GOING
16 TO BE A DISMISSAL OR JUST A STATUS REPORT THAT
17 YOU'RE NOT DISMISSING IT.

18 MR. SAVERI: IT'S SOME VERSION OF A YES
19 OR A NO.

20 THE COURT: SURE.

21 MR. SAVERI: PROBABLY MORE LONG THAN THAT
22 BECAUSE IT'S A LAWYER WHO'S WRITING IT.

23 THE COURT: OKAY. SO THEN LET ME ASK YOU
24 ANOTHER QUESTION.

25 YOUR 16600 CLAIM --

1 MR. SAVERI: YES.

2 THE COURT: -- ONLY ASKS FOR DEC RELIEF.

3 SO IF YOU DROP YOUR PRAYER FOR
4 DECLARATORY RELIEF, IS THAT ONE GONE AS WELL?

5 MR. SAVERI: YOU KNOW, YOUR HONOR, THAT
6 WAS THE -- THAT WAS THE -- THAT WAS THE HATCH THAT
7 I DIDN'T WANT TO STEP INTO, AND I WAS THINKING IN
8 THE BACK OF MY MIND --

9 THE COURT: YEAH.

10 MR. SAVERI: -- SO I -- I UNDERSTAND WHAT
11 YOU'RE SAYING.

12 THE COURT: YEAH.

13 MR. SAVERI: AND I'D LIKE TO CONSIDER
14 THAT --

15 THE COURT: SURE.

16 MR. SAVERI: -- IN THE CONTEXT OF YOUR
17 ORIGINAL REQUEST.

18 THE COURT: OKAY. SO CAN YOU LET ME KNOW
19 ON THAT ONE AS WELL IN YOUR FILING?

20 MR. SAVERI: YES.

21 THE COURT: ALL RIGHT. OKAY. THANK YOU.

22 OKAY. LET'S MOVE ON TO YOUR CLASS
23 DEFINITION.

24 SO YOUR ACTUAL CLASS MEMBERS ARE ALL
25 SOFTWARE ENGINEERS, OR I SHOULD SAY I GUESS THE

1 LEAD, OR THE NAMED PLAINTIFFS.

2 BUT THE DEFINITION IS FAR BROADER.

3 MR. SAVERI: THAT --

4 THE COURT: BUT IN YOUR COMPLAINT, YOU
5 KIND OF TALK ABOUT SKILLED EMPLOYEES.

6 SO TELL ME IF YOU ARE GOING TO REFINE THE
7 CLASS. ARE YOU GOING TO NARROW IT TO EITHER
8 SKILLED EMPLOYEES, SOFTWARE ENGINEERS? HOW ARE YOU
9 GOING TO DO THAT?

10 MR. SAVERI: WELL, YOUR HONOR, FIRST
11 PROCEDURALLY, THE TIME TO DO THAT IS IN CONNECTION
12 WITH THE CLASS CERTIFICATION MOTION ITSELF, AND WE
13 INTEND, PURSUANT TO THE COURT'S SCHEDULE, WHEN WE
14 FILE OUR OPENING BRIEF TO HAVE HAD AN OPPORTUNITY
15 TO LOOK AT THE RECORDS, WHICH INCLUDE STATISTICAL
16 AND OTHER RECORDS FROM THE DEFENDANTS --

17 THE COURT: OKAY.

18 MR. SAVERI: -- AND TO -- AND TO MAKE
19 THAT DECISION.

20 THE ANSWER TO YOUR QUESTION IS WE ARE
21 CONSIDERING IT.

22 THE COURT: OKAY.

23 MR. SAVERI: I DON'T WANT TO SAY RIGHT
24 NOW WHETHER WE WILL NARROW IT OR DEFINE IT IN SOME
25 OTHER FASHION.

1 I THINK IT IS LIKELY, BASED ON WHAT WE
2 LEARN, IF WE HAVE A CHANCE TO LOOK AT THE
3 DOCUMENTS, THAT THE DEFINITION WILL BE TAILORED IN
4 SOME RESPECT.

5 BUT ULTIMATELY THAT, IN PART, WILL
6 REFLECT WHAT THE EVIDENCE SHOWS AND WHAT -- AND
7 THAT EVIDENCE IS IN THE HANDS OF THE DEFENDANTS.

8 SO WE -- WE ARE SENSITIVE TO THE QUESTION
9 YOU'VE RAISED.

10 BUT THE TIME TO RESOLVE THAT IS NOT NOW
11 ON THE PLEADINGS, BUT IN CONNECTION WITH THE CLASS
12 CERTIFICATION MOTION.

13 THE COURT: OKAY. WELL, I'LL JUST STATE
14 MY PERSONAL PREFERENCE IS, IF YOU CAN, TO DO IT
15 SOONER THAN CLASS CERT BECAUSE, YOU KNOW, SOMETIME
16 DURING CLASS CERT THERE'S GOING TO BE A DISPOSITIVE
17 MOTION FILED, AND THEN THERE WILL BE THIS WHOLE
18 QUESTION ABOUT, WELL, WE DIDN'T TAKE DISCOVERY AND
19 GET EXPERT DISCOVERY ON THAT CLASS DEFINITION, AND
20 IT'S JUST GOING TO --

21 MR. SAVERI: YEAH.

22 THE COURT: -- DELAY THE PROCEEDINGS.

23 AND THEN IT JUST -- IT MAKES IT A MESS,
24 THEN, TO HAVE A SUMMARY JUDGMENT ON THE OLD
25 DEFINITION AND YOU'RE TRYING TO GET IN A NEW

1 DEFINITION.

2 IT'S KIND OF HAIRY.

3 SO --

4 MR. SAVERI: WE'LL TRY TO GET IT NAILED
5 DOWN AS SOON AS POSSIBLE.

6 THE COURT: OKAY.

7 MR. SAVERI: AMONG OTHER THINGS, I WOULD
8 SAY THAT WE -- YOU ARE RIGHT THAT OUR CLASS
9 REPRESENTATIVES ARE SOFTWARE ENGINEERS BY TRADE.

10 THE COURT: UM-HUM.

11 MR. SAVERI: OR BY VOCATION, AND PERHAPS
12 BY CATEGORIZATION WITHIN THE DEFENDANTS' OWN
13 RECORDS.

14 AND WE DON'T ACTUALLY KNOW HOW THEY
15 CATEGORIZE THEIR EMPLOYEES COMPLETELY, AND THAT'S
16 ONE OF THE PIECES OF INFORMATION THAT'S IMPORTANT.

17 I THINK THE CLASS WILL BE SOMEWHAT
18 BROADER THAN SOFTWARE ENGINEERS, AND I'M KIND OF
19 GROPING FOR THE RIGHT WAY TO DESCRIBE THAT.

20 THE COURT: OKAY.

21 MR. SAVERI: AND I DON'T KNOW IF IT'S
22 SOME KIND OF SOFTWARE ENGINEERS PLUS, OR SOME OTHER
23 FORMULATION.

24 THE COURT: OKAY.

25 MR. SAVERI: BUT THAT'S THE KIND OF -- WE

1 WANT TO FIND OBJECTIVE, ASCERTAINABLE
2 CHARACTERISTICS THAT THE COURT CAN RELY ON FOR
3 PURPOSES OF NOTICE, AND THAT'S WHAT RULE 23
4 REQUIRES, AND WE NEED SOME MORE INFORMATION IN
5 ORDER TO DO THAT.

6 BUT WE WANT -- WE ARE GOING TO DO THAT.

7 THE COURT: OKAY.

8 MR. RILEY: YOUR HONOR, IF I MAY BE HEARD
9 ON THAT?

10 WE THINK IT'S PROFOUNDLY IMPORTANT THAT
11 IN THEIR AMENDED COMPLAINT THEY DO PROPERLY DEFINE
12 WHO THE PLAINTIFFS ARE, BECAUSE THAT IS GOING TO
13 DETERMINE THE CONTOURS OF DISCOVERY.

14 THE DEPARTMENT OF JUSTICE, IN ITS
15 COMPLAINT AND ITS COMPETITIVE IMPACT STATEMENT,
16 TALKED ABOUT ENGINEERS AND SCIENTISTS.

17 THEY'VE SEEN THE DOCUMENTS. THERE IS NO
18 BASIS AT ALL TO GO BEYOND THAT LIMITED SCOPE. THEY
19 PROVIDED THE COURT WITH NO BASIS WHATSOEVER TO
20 EXPAND IT.

21 MR. SAVERI: WELL, WOULD MR. RILEY AGREE
22 TODAY THAT THAT'S THE PROPER CLASS DEFINITION IN
23 THIS CASE?

24 MR. RILEY: NO, I'M NOT PREPARED TO AGREE
25 TO IT.

1 BUT THAT'S THEIR BURDEN TO HAVE A
2 PROPERLY DEFINED CLASS.

3 MR. SAVERI: WELL, YOUR HONOR, I THINK
4 THAT ANSWER IS INSTRUCTIVE AND HIGHLIGHTS MY POINT.

5 THE COURT: ALL RIGHT. LET ME ASK BOTH
6 OF YOU IF THE CARTWRIGHT ACT AND SHERMAN ACT CLAIMS
7 RISE AND FALL TOGETHER? YOU AGREE WITH THAT?

8 MR. RILEY: THEY DO FOR PLEADING
9 PURPOSES.

10 THE COURT: YOU AGREE WITH THAT, OR NOT?

11 MR. SAVERI: I WOULD SAY -- NOT, NOT -- I
12 WOULD SAY NOT NECESSARILY, YOUR HONOR.

13 I THINK THAT -- IN THESE RESPECTS:
14 DEPENDING ON -- I DON'T THINK THERE'S ANY DOUBT IN
15 THIS CASE, YOUR HONOR, THAT WE'VE PLED A PER SE
16 CLAIM WITH THE REQUISITE SPECIFICITY, AND THAT
17 CLAIM -- OR THOSE FACTS ARE SUFFICIENT UNDER BOTH
18 THE SHERMAN AND CARTWRIGHT ACT CLAIM.

19 CERTAINLY THERE IS LAW, AND IT IS
20 ESTABLISHED, THAT THE CARTWRIGHT ACT ITSELF IS MORE
21 BROAD, PROHIBITS MORE ANTITRUST ACTIVITY THAN THE
22 SHERMAN ACT DOES.

23 ALTHOUGH IN THIS CASE, YOUR HONOR, WHERE
24 WE HAVE A HORIZONTAL -- WE'RE ALLEGING A HORIZONTAL
25 CONSPIRACY BETWEEN COMPETITORS, AND THIS ALLEGATION

1 IS RIGHT IN THE MIDDLE OF THE SWEET SPOT OF BOTH
2 THE SHERMAN ACT AND THE CARTWRIGHT ACT, AND SO I
3 DON'T THINK THAT THE ANSWER DIFFERS AT ALL UNDER
4 THE SHERMAN AND CARTWRIGHT ACT.

5 BUT -- SO AS A TECHNICAL MATTER, AND
6 MAYBE IT'S SOMETHING THAT PEOPLE DEBATE, THE
7 CARTWRIGHT ACT IS MORE BROAD IN A NUMBER OF
8 RESPECTS.

9 I DON'T THINK IT REALLY MATTERS HERE
10 GIVEN THE STRENGTH AND SPECIFICITY OF THE
11 ALLEGATIONS.

12 THE COURT: OKAY. NOW, THE DEFENDANTS'
13 POSITION IS THAT THE COURT DOESN'T HAVE TO DECIDE
14 RIGHT NOW IF THE STANDARD IS, YOU KNOW, A PER SE
15 VIOLATION OR RULE OF REASON.

16 DO YOU AGREE WITH THAT, OR NOT?

17 MR. SAVERI: I GENERALLY AGREE WITH THAT,
18 YOUR HONOR. I THINK WE'VE PLED A PER SE CLAIM, BUT
19 I ALSO THINK THAT THAT IS SOMETHING THAT SHOULD BE
20 DECIDED AS WE DEVELOP A MORE COMPLETE RECORD.

21 THE COURT: LET ME ASK, SO FROM THE
22 DEFENDANTS' PERSPECTIVE, YOUR STIPULATION THAT THE
23 DEPARTMENT OF JUSTICE HAD STATED A SHERMAN ACT
24 CLAIM SHOULD BE GIVEN NO WEIGHT AND HAS NO BEARING?

25 MR. RILEY: THAT IS CORRECT. UNDER

1 SECTION V OF THE CLAYTON ACT, IT HAS NO BEARING AT
2 ALL IN THESE PROCEEDINGS.

3 THAT IS A DIFFERENT CASE, DIFFERENT
4 ALLEGATIONS, AND SECTION V OF THE CLAYTON ACT SAYS
5 IT HAS ABSOLUTELY NO EFFECT ON A CIVIL PROCEEDING.

6 THEY HAVE A DIFFERENT BURDEN AND THEY'VE
7 ALLEGED A DIFFERENT THEORY OF THE CASE.

8 THE COURT: WHAT -- ARE YOU ARGUING BOTH
9 ARTICLE III STANDING AND -- ARTICLE III INJURY AND
10 ANTITRUST INJURY, OR BOTH?

11 MR. RILEY: WE'RE ARGUING ANTITRUST
12 INJURY WITH REGARD TO ALL PLAINTIFFS. WE'RE
13 ARGUING ARTICLE III STANDING WITH REGARD TO
14 PLAINTIFFS WHO ARE ATTEMPTING TO ALLEGE INJURY FROM
15 MEMBERS OF THE ALLEGED CONSPIRACY WHO ARE NOT IN
16 PRIVACY WITH THE COMPANY THAT THEY WORKED FOR.

17 IN OTHER WORDS, MR. DEVINE HAS NO
18 ARTICLE III STANDING WITH REGARD TO ANYTHING THAT
19 HAD TRANSPIRED, ALLEGEDLY, BETWEEN INTUIT AND
20 GOOGLE.

21 MR. DEVINE HAS NO ANTITRUST INJURY AND,
22 HENCE, NO STANDING UNDER THE ANTITRUST LAWS WITH
23 REGARD TO THE ALLEGED CONSPIRACY.

24 THE COURT: OKAY. WELL, LET'S TAKE A
25 LOOK AT PARAGRAPH 108. IT'S REALLY HARD TO MAKE

1 THE INFERENCE THAT THERE WASN'T A CONSPIRACY
2 BETWEEN ADOBE, APPLE, GOOGLE, PIXAR, AND LUCASFILM.

3 MR. RILEY: UNDER --

4 THE COURT: ARE YOU SAYING IT WAS
5 STEVE JOBS AT APPLE AND AT PIXAR, WITH SCHMIDT AND
6 LEVINSON ON THE BOARD OF GOOGLE AND APPLE, THAT --
7 HOW CAN YOU ARGUE THAT THERE WAS NO KNOWLEDGE
8 AMONGST THAT SET OF COMPANIES?

9 MR. RILEY: VERY EASILY.

10 THE COURT: UM-HUM.

11 MR. RILEY: UNDER TWOMBLY, THE SUPREME
12 COURT SAYS YOU MUST CONSIDER WHETHER THERE IS AN
13 OBVIOUS ALTERNATIVE EXPLANATION THAT'S EXPLAINED BY
14 THE SELF-INTERESTED BEHAVIOR OF THE ALLEGED
15 CONSPIRATORS.

16 WE KNOW, AND THIS COURT SHOULD REFER TO
17 IT, BECAUSE IT'S REFERRED TO IN THE COMPLAINT, THE
18 COMPETITIVE IMPACT STATEMENT OF THE DEPARTMENT OF
19 JUSTICE.

20 THEY RELIED ON IT. PLAINTIFFS QUOTE FROM
21 THE COMPETITIVE IMPACT STATEMENT.

22 THAT COMPETITIVE IMPACT STATEMENT SAYS,
23 AT PAGE 9, THAT THERE WERE COLLABORATIONS AMONG ALL
24 OF THESE DEFENDANTS, COLLABORATIONS THAT HAD
25 PRO-COMPETITIVE EFFECTS.

1 SO THE OBVIOUS EXPLANATION FOR THESE
2 RELATIONSHIPS IS THAT THESE WERE NON-SOLICITATION
3 AGREEMENTS, UNILATERAL IN NATURE BECAUSE THOSE ARE
4 COMMON IN THE INDUSTRY.

5 IN FACT, THE DEPARTMENT OF JUSTICE
6 SAYS --

7 THE COURT: THE DEPARTMENT OF JUSTICE DID
8 NOT MAKE A FINDING THAT THESE WERE AGREEMENTS OR
9 COLLABORATIONS AND THAT THESE WERE NECESSARY AND
10 REASONABLY NECESSARY FOR COLLABORATIONS AND THAT
11 THESE WERE LIMITED ENOUGH TO BE LEGITIMATE FOR A
12 COLLABORATION CONTEXT.

13 MR. RILEY: AND WE DISAGREE WITH THE
14 DEPARTMENT OF JUSTICE ON THAT.

15 THE COURT: UM-HUM.

16 MR. RILEY: BUT WHAT THE DEPARTMENT OF
17 JUSTICE DID NOT, IN FACT, FIND WAS THAT THERE WAS
18 ANY OVERARCHING CONSPIRACY, EVEN AMONG APPLE,
19 PIXAR, AND LUCASFILM. THERE WAS NO FINDING OF
20 OVERARCHING CONSPIRACY.

21 THE DEPARTMENT OF JUSTICE SAID THESE WERE
22 SEPARATE BILATERAL AGREEMENTS, SEPARATE BILATERAL
23 AGREEMENTS.

24 AND THEY SPENT TWO YEARS INVESTIGATING
25 THIS AND THEY FOUND NO OVERARCHING CONSPIRACY AMONG

1 ANY OF THE DEFENDANTS AT ALL.

2 AND, IN FACT, THEY FOUND THESE WERE
3 COLLABORATIONS AMONG THESE COMPANIES AND
4 RELATIONSHIPS.

5 STEVE JOBS WAS THE CEO OF PIXAR AND APPLE
6 AT THE SAME TIME. HE COULDN'T CONSPIRE WITH
7 HIMSELF.

8 SO THE GOVERNMENT CLAIMS THAT THE
9 RESTRAINTS WENT TOO FAR. WE DISAGREE WITH THAT.

10 BUT, AGAIN, THE OBVIOUS EXPLANATION FOR
11 THE EXISTENCE OF THESE ALLEGED AGREEMENTS WERE THE
12 COLLABORATIONS, NOT AN ANTICOMPETITIVE INTENT.

13 BUT MORE IMPORTANTLY --

14 THE COURT: I FIND THAT -- BASED ON THE
15 ALLEGATIONS IN THE COMPLAINT, I FIND THAT A BIT
16 HARD TO BELIEVE.

17 THIS WAS TOO -- ANYWAY, GO AHEAD.

18 MR. RILEY: BUT THE FACT THAT MR. JOBS
19 WAS CEO OF BOTH PIXAR AND APPLE, AND THAT THERE WAS
20 SOME COMMON BOARD MEMBERSHIP, DOES NOT IN ANY WAY
21 SUGGEST AN OVERARCHING CONSPIRACY. IT DOESN'T.

22 WHAT CAN EXPLAIN THESE BILATERAL
23 AGREEMENTS ARE THE OBJECTIVES OF THESE
24 COLLABORATIONS.

25 IN FACT, GIVEN THE NATURE OF THIS

1 CONSPIRACY, IT'S IMPLAUSIBLE THAT IT WAS
2 OVERARCHING.

3 IF YOU LOOK AT PARAGRAPH 108, PIXAR IS
4 FREE --

5 THE COURT: IF THE INDUSTRY DOESN'T WANT
6 A BIDDING WAR, THEN THE INDUSTRY DOESN'T WANT A
7 BIDDING WAR AND THEY WILL MAKE SURE THAT THERE IS
8 COMPLIANCE WITHIN THE INDUSTRY TO PREVENT A BIDDING
9 WAR AND POACHING.

10 I --

11 MR. RILEY: AND THEY WOULD DO THAT IN A
12 WAY THAT IS FUNDAMENTALLY INCONSISTENT WITH WHAT IS
13 ALLEGED.

14 AND THAT IS BECAUSE -- AND, YOUR HONOR,
15 IF I COULD, I TOOK PARAGRAPH 108 AND I USED IT --
16 IF I CAN PASS THIS UP --

17 MR. SAVERI: YOUR HONOR --

18 THE COURT: HAVE YOU SHOWN THIS TO
19 MR. SAVERI?

20 MR. SAVERI: NO.

21 MR. RILEY: I'M SHOWING THIS TO
22 MR. SAVERI. THIS IS FROM HIS REPLY, PARAGRAPH 108.
23 IT'S SLIDE 7.

24 THE COURT: IF IT'S PARAGRAPH 108, I HAVE
25 IT BEFORE ME AND I DON'T NEED IT.

1 MR. SAVERI: WE DON'T -- THAT'S NOT
2 PARAGRAPH 108.

3 MR. RILEY: IT'S THE -- IT'S THE --

4 MR. SAVERI: SO --

5 MR. RILEY: WHAT I'M TRYING TO
6 DEMONSTRATE, YOUR HONOR, IS, USING HIS CHART, WE
7 PLACED MR. DEVINE AT ADOBE DURING THIS PERIOD.

8 NOW, IF, IN FACT, THERE WAS A CONSPIRACY
9 TO STOP COLD CALLING IN THE INDUSTRY, IT WOULDN'T
10 LOOK LIKE THIS BECAUSE EVERY MEMBER OF THIS
11 CONSPIRACY, THE SO-CALLED CONSPIRACY, EXCEPT APPLE
12 IS FREE TO COLD CALL MR. DEVINE, EVERY SINGLE ONE
13 OF THEM.

14 AND WE KNOW FROM THE ALLEGATIONS IN THE
15 COMPLAINT THAT THIS IS AN INDUSTRY THAT DOES
16 NATIONAL RECRUITING AMONG ALL HIGH TECH COMPANIES.

17 MR. SAVERI: YOUR HONOR, AT THIS POINT
18 I -- IT'S PRETTY -- I DON'T RECOGNIZE THIS. I'M
19 PRETTY SURE THIS ISN'T IN MY COMPLAINT.

20 MR. RILEY: NO. I'M TRYING TO
21 DEMONSTRATE, USING HIS EXHIBIT, WHAT THIS REALLY
22 MEANS, WHICH IS THAT EVERYONE, OTHER THAN APPLE,
23 UNDER THEIR ALLEGATIONS IS FREE TO COLD CALL ADOBE,
24 EVERYONE.

25 SO ANY CONSPIRACY THAT WOULD SUGGEST, AS

1 THE COURT PUT IT, AN EFFORT TO STOP COLD CALLING,
2 TO SUPPRESS WAGES, WOULD NOT LOOK LIKE THIS.

3 IN THIS CONSPIRACY, THIS SO-CALLED
4 CONSPIRACY, EVERY SINGLE MEMBER IS FREE TO CALL
5 MR. DEVINE.

6 IN FACT, IF YOU TAKE THEIR ALLEGATIONS,
7 GOOGLE CAN NOW MAKE MORE CALLS TO ADOBE BECAUSE
8 IT'S ALLEGEDLY CONSTRAINED FROM CALLING INTUIT.

9 AND UNDER THEIR OWN ALLEGATIONS, INTUIT
10 IS FREE TO CALL ANYONE, INCLUDING GOOGLE.

11 SO THIS CAN'T BE A CONSPIRACY. THIS IS
12 WHY WE'VE MAINTAINED IT IS IMPLAUSIBLE, BASED ON
13 THESE ALLEGATIONS --

14 THE COURT: WAIT. HOW CAN INTUIT CALL
15 GOOGLE WHEN THEY HAVE AN AGREEMENT WITH GOOGLE NOT
16 TO DO POACHING?

17 MR. RILEY: UNDER THE ALLEGATIONS -- AND
18 AGAIN, THIS IS ON PAGE 3 OF THE COMPETITIVE IMPACT
19 STATEMENT, WHICH IS REFERENCED IN THE COMPLAINT --
20 THE AGREEMENT BETWEEN GOOGLE AND INTUIT ONLY WENT
21 ONE WAY. GOOGLE AGREED NOT TO CALL INTUIT.

22 INTUIT WAS FREE TO CALL GOOGLE.

23 AND THEN INTUIT WAS FREE TO CALL EVERY
24 OTHER MEMBER OF THE CONSPIRACY, THE SO-CALLED
25 CONSPIRACY.

1 THAT'S THE DIFFERENCE IN THE NATURE OF
2 THESE SO-CALLED NON-SOLICITATION AGREEMENTS. THEY
3 WERE VERY DIFFERENT AT DIFFERENT LEVELS. THEY'VE
4 JUST ALLEGED THAT THEY WERE THE SAME.

5 THE COURT: AND GOOGLE WOULDN'T DEMAND
6 RECIPROCITY?

7 MR. RILEY: NO.

8 THE COURT: THEY WERE DOING IT OUT OF
9 KINDNESS AND GENEROSITY?

10 MR. RILEY: THEY DON'T ALLEGE WHY GOOGLE
11 AGREED NOT TO COLD CALL INTUIT.

12 AGAIN, THE OBVIOUS EXPLANATION WAS
13 BECAUSE OF A RELATIONSHIP BETWEEN THOSE TWO
14 COMPANIES.

15 SOMETIMES A COLLABORATION ONLY GOES ONE
16 WAY. SOMETIMES NON-SOLICITATION ONLY GOES ONE WAY.
17 THE EMPLOYEE WHO LEAVES A COMPANY AND IS UNDER A
18 NON-SOLICITATION ARRANGEMENT, THAT USUALLY JUST
19 GOES ONE WAY. THE FORMER EMPLOYEE CAN'T SOLICIT
20 THE EMPLOYEES OF THE FORMER EMPLOYER.

21 BUT THIS CONSPIRACY, WHICH IS WHAT
22 THEY'VE ALLEGED, IS INCONSISTENT WITH ANY KIND OF
23 SCHEME TO SUPPRESS WAGES.

24 THE WAGES AT ADOBE COULD NOT POSSIBILITY
25 BE CONSTRAINED UNDER THIS KIND OF ARRANGEMENT.

1 IT'S IMPLAUSIBLE.

2 THE COURT: ALL RIGHT. LET ME GO TO THE
3 UCL.

4 MR. SAVERI: I HAVE A LOT TO SAY ABOUT
5 THAT, AND I DON'T -- IF YOU HAVE -- WELL, FIRST OF
6 ALL, I'D POINT OUT THAT PARAGRAPH 104 OF OUR
7 COMPLAINT SAYS SPECIFICALLY THAT SENIOR EXECUTIVES
8 OF GOOGLE AND INTUIT AGREED, THROUGH DIRECT
9 COMMUNICATIONS, NOT TO COLD CALL EACH OTHER'S
10 EMPLOYEES.

11 SO MR. RILEY MAY BE ABLE -- I DON'T THINK
12 HE'S ABLE TO PROVE IT, BUT THAT IS AN ALLEGATION
13 WHICH IS DIRECTLY CONTRARY TO THE ALLEGATIONS IN
14 OUR COMPLAINT, AND THAT REALLY JUST HIGHLIGHTS THIS
15 ENTIRE ARGUMENT.

16 I MEAN, THIS IS NOT IN OUR COMPLAINT AND
17 IT IS INCONSISTENT WITH THE, THE PLAUSIBLE FACTS
18 WE'VE ALLEGED.

19 YOUR HONOR ASKED A QUESTION ABOUT
20 STANDING, I THOUGHT, AND WE GOT THIS.

21 I THINK I CAN -- I'M PUZZLED BY THAT. I
22 MEAN, I WANT TO JUST ADDRESS THE STANDING POINT,
23 WHICH IS THE INTENT -- THE PURPOSE AND THE INTENT
24 OF THIS CONSPIRACY WAS TO LIMIT MOBILITY OF OUR
25 CLASS MEMBERS AND TO DEPRESS THEIR WAGES.

1 THE DIRECT TARGET OF THAT CONSPIRACY WAS
2 MR. DEVINE AND THE MEMBERS OF THE CLASS.

3 THAT IS -- THEY WERE PAID TOO LITTLE AND
4 THEIR MOBILITY WAS DECREASED.

5 THAT IS CLEAR ARTICLE III STANDING. THAT
6 IS THE CLASSIC TYPE OF ANTITRUST INJURY, BECAUSE
7 IT'S EXACTLY THE TYPE OF ANTITRUST INJURY THAT THE
8 LAWS WERE INTENDED TO PREVENT.

9 NOW, WE -- I DON'T KNOW EXACTLY WHAT TO
10 SAY ABOUT THIS. I THINK MR. RILEY IS SUGGESTING IN
11 SOME WAYS THAT THE CONSPIRACY IS MORE BROAD THAN
12 THE ONE WE ALLEGE, OR THAT UNLESS EVERYBODY IN THE
13 INDUSTRY IS INVOLVED IN A CONSPIRACY, IT'S NOT
14 PLAUSIBLE.

15 BUT THAT NEGLECTS WHAT OUR SPECIFIC
16 ALLEGATIONS ARE.

17 THE COURT: LET ME ASK, WITH REGARD TO
18 THE UCL, TALKING ABOUT STANDING, YOU ONLY HAVE A
19 FOOTNOTE THAT ADDRESSES THE DEFENDANTS' POINT HERE
20 THAT THERE'S NO RESTITUTION AND HOW COULD ANY
21 POTENTIAL SALARY THAT MR. DEVINE OR ANYONE ELSE
22 COULD HAVE POTENTIALLY MADE, HOW IS THAT ANYTHING
23 OTHER THAN ATTENUATED EXPECTANCY?

24 MR. SAVERI: YOUR HONOR, WE, FRANKLY,
25 DIDN'T HAVE AS -- WE COULD HAVE TAKEN MORE SPACE,

1 AND I GUESS I APOLOGIZE FOR PUTTING THE ARGUMENT,
2 THE RESPONSE IN A FOOTNOTE.

3 THE COURT: UM-HUM.

4 MR. SAVERI: BUT BASICALLY OUR RESPONSE
5 IS THE CRUZ CASE --

6 THE COURT: YEAH.

7 MR. SAVERI: -- WHICH HOLDS THAT UNDER
8 THE UCLA -- THE UCL, EXCUSE ME -- THAT AFFECTED
9 PERSONS ARE ENTITLED TO NON-RESTITUTIONARY
10 DISGORGEMENT.

11 WE DIDN'T SPEND A LOT OF TIME BRIEFING
12 THAT OR EXPLAINING WHAT THAT CASE SAYS. WE REFER
13 YOU TO THAT CASE.

14 THE COURT: UM-HUM.

15 MR. SAVERI: I THINK IF YOU WANT US TO
16 EXPLAIN IT MORE, WE CAN.

17 BUT I, FRANKLY, DIDN'T WANT TO SPEND A
18 LOT OF TIME OR PAGES ON THAT ARGUMENT.

19 SO --

20 THE COURT: WELL, I MEAN, UCL, IT'S
21 EITHER INJUNCTION OR DECLARATORY RELIEF, WHICH
22 WE'VE ALREADY HANDLED, OR IT'S RESTITUTION.

23 MR. SAVERI: RIGHT.

24 THE COURT: SO IF THERE'S NO RESTITUTION
25 HERE, THEN THAT CAUSE OF ACTION IS GOING TO BE

1 GONE, RIGHT?

2 MR. SAVERI: SO LIKE I SAID, YOUR
3 HONOR --

4 THE COURT: YEAH.

5 MR. SAVERI: -- OUR CASE IS THE CRUZ CASE
6 WHICH SAYS THAT THERE CAN BE NON-RESTITUTIONARY
7 DISGORGEMENT UNDER 17200.

8 THE COURT: OKAY.

9 MR. RILEY: YOUR HONOR, THE CRUZ CASE
10 DOES NOT SAY THAT.

11 THE CRUZ CASE, CITING -- AND IN
12 PARTICULAR KOREA SUPPLY, KOREA SUPPLY SAYS, AS THE
13 COURT HAS SAID, RESTITUTION IS IT.

14 IF IT'S DISGORGEMENT ALONG WITH
15 RESTITUTION, IT CAN BE RESTITUTION. IT CANNOT BE
16 DISGORGEMENT OF PROFITS. IT CANNOT BE AN
17 EXPECTATION FORM OF DAMAGES.

18 IT MUST BE SOMETHING THAT THE PLAINTIFFS,
19 THE PLAINTIFF CLASS HAD AN INTEREST IN, MONEY THAT
20 WAS TAKEN FROM THEM OR PROPERTY THAT WAS TAKEN FROM
21 THEM.

22 IF YOU DO IT ON A CLASS BASIS -- AND THIS
23 IS WHAT CRUZ SAYS -- YOU CAN DO IT WITH A RECOVERY,
24 BUT IT MUST BE RESTITUTIONARY DAMAGES. THAT'S THE
25 ONLY FORM OF MONEY DAMAGE RELIEF.

1 THEY HAVEN'T ALLEGED RESTITUTION. THEY
2 CANNOT ALLEGE RESTITUTION UNDER THESE FACTS.

3 MR. SAVERI: YOUR HONOR, THE RESTITUTION
4 THAT WE WOULD ASK IS FOR THE MEMBERS OF THE CLASS,
5 THE PEOPLE THAT WERE AFFECTED, THAT THEY WERE PAID
6 LESS THAN THEY OTHERWISE WOULD HAVE BEEN PAID IN AN
7 UNDISTORTED, FREE AND OPEN MARKET.

8 THAT MONEY WAS DENIED THEM AND PUT INTO
9 THE TREASURIES AND COFFERS OF THESE COMPANIES TO BE
10 DISGORGED, AND IT CAN BE DISGORGED DIRECTLY TO THE
11 AFFECTED PERSON OR, AS MR. RILEY SAYS CORRECTLY,
12 THAT CALIFORNIA LAW, UNDER BRUNO AND THOSE CASES
13 WHICH WE DIDN'T CITE, CALIFORNIA COURTS RECOGNIZE
14 THE PRINCIPLE OF FLUID RECOVERY IN THESE -- IN THIS
15 CONTEXT.

16 THE COURT: IS IT POSSIBLE TO HAVE A
17 RULING UNDER THE UCL THAT THE PLAINTIFFS HAVE LOST
18 MONEY, BUT CAN'T BE REMEDIED THROUGH RESTITUTION?

19 FOR PURPOSES OF STANDING, THEY'VE LOST
20 MONEY, BUT THERE'S NO RESTITUTIONARY DAMAGES?

21 MR. SAVERI: I'M SORRY, YOUR HONOR. I
22 ACTUALLY LOST THE QUESTION. COULD YOU REPEAT IT,
23 PLEASE?

24 THE COURT: SURE. WELL, ACTUALLY, IF
25 THERE IS NO RESTITUTIONARY DAMAGE AND THERE'S NO

1 INJUNCTION AND NO DECLARATORY RELIEF, THEN THE UCL
2 CAUSE OF ACTION IS GONE ANYWAY. FORGET THAT
3 QUESTION.

4 MR. SAVERI: YEAH.

5 THE COURT: LET ME ASK, MR. SAVERI, WHERE
6 IN THE CONSOLIDATED AMENDED COMPLAINT THERE ARE
7 ALLEGATIONS OF FRAUD FOR A, YOU KNOW, FRAUDULENT
8 PRONG OF THE UCL. ARE THERE ANY?

9 MR. SAVERI: YOUR HONOR, I WOULD SAY THAT
10 THERE IS NO -- THE ONLY -- I DON'T THINK WE'VE
11 ALLEGED FRAUD WITH SPECIFICITY HERE.

12 THE -- WHAT WAS FRAUDULENT WAS THAT
13 THE -- THAT WHAT THE COMPANIES WERE PAYING --
14 REMEMBER, THE COMPANIES CONCEALED THIS PRACTICE, SO
15 WHEN THEY WERE TELLING PEOPLE WHAT THEY -- WHAT THE
16 MARKET WAS AND WHAT THEY WERE WILLING TO PAY, THE
17 FRAUD WAS THEIR FAILURE TO DISCLOSE THAT, IN FACT,
18 WAGES WERE BEING SET PURSUANT TO THIS CONSPIRACY
19 THAT WE ALLEGE AS OPPOSED TO PRICES SET BY A FREE
20 MARKET.

21 WE HAVE NOT -- WE HAVE THE LAST PART IN
22 HERE, BUT WE DON'T INCLUDE THAT SPECIFICALLY IN OUR
23 17200 CLAIM.

24 THE COURT: ALL RIGHT. SO THEN WOULD YOU
25 CONCEDE THE FRAUD PRONG AS A BASIS FOR THE UCL?

1 YOU CONCEDE THAT?

2 MR. SAVERI: YES, YOUR HONOR.

3 THE COURT: OKAY. THAT MAKES THAT
4 EASIER. THANK YOU.

5 OKAY. WE HAVE SOME CMC ISSUES.

6 MR. RILEY: YOUR HONOR, BEFORE -- IF I
7 MAY JUST BRIEFLY?

8 THE COURT: PLEASE.

9 MR. RILEY: THE REFERENCE TO THE INTUIT
10 ARRANGEMENT IS FOUND IN EXHIBIT B TO THE HARVEY
11 DECLARATION ON PAGE 3.

12 FOR THE RECORD, IT SAYS ASIDE FROM THE
13 GOOGLE AND INTUIT AGREEMENT, WHICH ONLY PROHIBITED
14 GOOGLE FROM COLD CALLING ANY INTUIT EMPLOYEE.

15 THEY SUBMITTED THAT. THEY RELIED ON
16 THAT. THAT WAS THE COMPETITIVE IMPACT STATEMENT.

17 BUT EVEN IF INTUIT WAS RESTRAINED FROM
18 CALLING GOOGLE, IT IS CLEAR THAT EVERY MEMBER OF
19 THE ALLEGED CONSPIRACY, OTHER THAN APPLE, COULD
20 COLD CALL MR. DEVINE. THIS CANNOT HAVE BEEN A
21 CONSPIRACY.

22 AGAIN, THE BEST CASE CITATION ON THAT WAS
23 READY MIX CONCRETE WHERE THERE WAS CRIMINAL
24 ADMISSIONS OF PRICE FIXING, BUT YET THE COURT FOUND
25 NO OVERALL CONSPIRACY BECAUSE THERE WAS NO

1 PLAUSIBLE OVERALL CONSPIRACY.

2 THANK YOU.

3 THE COURT: ALL RIGHT. LET'S GO TO THE
4 CMC PORTION.

5 I'M LIFTING THE STAY OF DISCOVERY.

6 AND WITH REGARD TO THE GOOGLE DRAFT
7 E-MAILS, THOSE ARE TO BE PRODUCED, AND YOU ARE TO
8 DESIGNATE WHICH ONES WERE DRAFTS AND WHICH ONES
9 WERE SENT. OKAY?

10 LET ME JUST ASK, SORT OF GOING FORWARD,
11 BECAUSE EVEN IF I DO GRANT A MOTION TO DISMISS,
12 IT'S GOING TO BE WITH LEAVE TO AMEND AND, AS I
13 SAID, I THINK THERE'S A SUFFICIENT STATEMENT OF A
14 CLAIM AS TO THE BILATERAL AGREEMENTS.

15 I'M DISINCLINED BASED ON THE OVERARCHING
16 CONSPIRACY AT THIS POINT, BUT I'D GIVE THEM LEAVE
17 TO AMEND AND SEE IF THE PLAINTIFFS CAN ADD
18 ADDITIONAL FACTUAL ALLEGATIONS THAT WOULD HAVE THAT
19 SURVIVE ANY SUBSEQUENT MOTION TO DISMISS.

20 BUT HOW IS THIS GOING TO GO FORWARD? ARE
21 THE DEFENDANTS GOING TO ASK TO SEVER IF THIS GOES
22 TO TRIAL? I'M NOT SURE IF ALL THESE COMPANIES WANT
23 TO BE IN A BIG BLOCK OF DEFENDANTS.

24 HOW IS THIS CASE GOING TO PROCEED?
25 BECAUSE IT IS GOING TO PROCEED.

1 MR. MITTELSTAEDT: YOUR HONOR,
2 BOB MITTELSTAEDT.

3 I THINK THE FIRST STEP WOULD BE FOR THE
4 PLAINTIFFS TO FILE THEIR AMENDED COMPLAINT AND
5 DECIDE WHAT THEY WANT TO DO.

6 AND LET'S ASSUME THEY DECIDE NOT TO TRY
7 TO REALLEGE AN OVERARCHING CONSPIRACY AND THEY JUST
8 FOCUS ON THE BILATERAL AGREEMENTS.

9 THEN THEY HAVE SOME DECISIONS TO MAKE.
10 THEY HAVE TO DECIDE WHETHER THEY'RE GOING TO TRY
11 AND DO THAT IN ONE CASE OR IF THEY'RE GOING TO DO
12 IT IN SEPARATE CASES. THEY NEED TO DECIDE WHETHER
13 THEY WANT TO GO FORWARD. THEY NEED TO DECIDE --

14 THE COURT: OH, I THINK THEY'RE GOING
15 FORWARD. I DON'T THINK THAT'S A QUESTION.

16 MR. MITTELSTAEDT: WELL, THEY NEED TO
17 DECIDE -- I MEAN, THEY REALLY DO NEED TO THINK
18 ABOUT THIS.

19 THE COURT: UM-HUM.

20 MR. MITTELSTAEDT: IF THEY DON'T HAVE
21 JOINT AND SEVERAL LIABILITY, WHAT ARE THEY GOING TO
22 DO? HOW ARE THEY GOING TO DEFINE THEIR CLASS? HOW
23 MANY CLASS MEMBERS ARE THEY GOING TO HAVE? WHAT'S
24 THE SCOPE OF THE CLASS THAT THEY'RE GOING TO
25 ALLEGE? THAT'S GOING TO HAVE A BIG EFFECT ON

1 DISCOVERY.

2 SO I THINK THE FIRST STEP IS TO TAKE A
3 LOOK AT THEIR AMENDED COMPLAINT.

4 IF THEY DROP THE OVERARCHING CONSPIRACY
5 AND JUST FOCUS ON THE BILATERAL AGREEMENTS, THEN
6 THE DEFENDANTS HAVE SOME DECISIONS TO MAKE, AND ONE
7 OF THEM WOULD BE WHETHER TO MOVE TO DISMISS FOR
8 MISJOINDER, WHETHER TO MOVE TO SEVER, WHEN WOULD BE
9 THE RIGHT TIME TO SEVER?

10 I RECOGNIZE WHAT YOUR HONOR SAYS, THAT IF
11 THIS DOES END UP WITH SIX DIFFERENT CASES, IT MAY
12 WELL -- THE COURT MIGHT WELL COORDINATE FOR
13 DISCOVERY.

14 BUT THOSE ARE THINGS THAT WE NEED TO SORT
15 OUT, I THINK, IN AN ORDERLY WAY AS THEY HAPPEN.

16 I'M GOING TO HASTEN TO ADD THOUGH, YOUR
17 HONOR, I DON'T THINK THIS NEEDS TO NECESSARILY
18 UPSET THE SCHEDULE.

19 THE COURT: OH, NO. I'M NOT MOVING THE
20 CASE SCHEDULE. THE CASE SCHEDULE IS AS WE SET IT
21 WHEN YOU ALL WERE HERE BACK IN OCTOBER.

22 MR. MITTELSTAEDT: AND WHAT I WAS GOING
23 TO SUGGEST IS --

24 THE COURT: YEAH.

25 MR. MITTELSTAEDT: -- I THINK IF WE SET A

1 RELATIVELY SHORT TIME PERIOD FOR AN AMENDED
2 COMPLAINT, WE WILL AGREE TO A SHORT TIME PERIOD TO
3 REVIEW THAT AND TO DECIDE WHETHER WE'RE GOING TO
4 MOVE TO DISMISS AGAIN, AND I THINK BOTH SIDES ARE
5 AGREEABLE TO AN EXPEDITED BRIEFING SCHEDULE ON ANY
6 SUBSEQUENT MOTION TO DISMISS.

7 AND THEN WHAT I WOULD SUGGEST, YOUR
8 HONOR, IS WE SIT DOWN IN THE MEANTIME AND TALK WITH
9 THE PLAINTIFFS ABOUT WHAT DISCOVERY THEY WANT IF
10 THIS CASE IS LIMITED TO BILATERAL AGREEMENTS.

11 THE COURT: NO, THAT -- THE STAY OF
12 DISCOVERY IS DONE. IT'S OVER. THIS CASE IS MOVING
13 FORWARD. SO DISCOVERY IS OPEN SEASON.

14 MR. MITTELSTAEDT: WELL, I UNDERSTAND
15 THAT, YOUR HONOR.

16 THE COURT: YEAH.

17 MR. MITTELSTAEDT: BUT WHAT WE HAVE
18 PENDING --

19 THE COURT: UM-HUM.

20 MR. MITTELSTAEDT: -- IS SOME 50 OR 60
21 REQUESTS FOR PRODUCTION OF DOCUMENTS, WHICH YOUR
22 HONOR SAID LAST TIME WAS OBVIOUSLY OVERBROAD ON ITS
23 FACE.

24 SO WHAT I WAS SUGGESTING, TO MOVE THINGS
25 ALONG, IS WE COULD DO THIS THE TRADITIONAL WAY,

1 WHICH IS WE TAKE 30 DAYS TO RESPOND TO THE -- DO A
2 WRITTEN RESPONSE TO THE RFP'S, BUT WHAT I WOULD
3 LIKE TO SUGGEST IS, IN THE MEANTIME, BEFORE WE DO
4 THAT, WE SIT DOWN WITH THE PLAINTIFFS AND SEE TO
5 WHAT EXTENT THEY'RE GOING TO NARROW THEIR DOCUMENT
6 REQUESTS, EITHER BECAUSE THEY'RE OVERBROAD NO
7 MATTER WHAT THEY'RE ALLEGING, OR BECAUSE THEY'RE
8 OVERBROAD PARTICULARLY IN LIGHT OF WHAT THEY'RE
9 GOING TO AMEND -- ALLEGE IN THEIR AMENDED
10 COMPLAINT.

11 THE COURT: WELL, I MAY -- YOU KNOW, I
12 MAY NOT GRANT THE MOTION TO DISMISS FOR THE SHERMAN
13 ACT CLAIM.

14 I MIGHT JUST -- YOU KNOW, I THINK THE
15 16600 IS GONE IF DECLARATORY RELIEF IS GONE.
16 THAT'S MOOT AND THAT'S OUT AND THEY MIGHT STIPULATE
17 TO THAT.

18 THE UCL, IF THERE'S NO RESTITUTION, YOU
19 GOT NO RELIEF AND BASICALLY NO STANDING, THAT'S
20 OUT.

21 MR. SAVERI: I'M NOT GOING TO REARGUE
22 THAT.

23 THE COURT: BUT THEY STILL HAVE AN
24 ANTITRUST CLAIM THAT'S GOING FORWARD, SO I
25 REALLY -- I DON'T WANT TO SEE -- I DON'T WANT TO

1 SEE ANY OBSTRUCTION ON THE DISCOVERY.

2 MR. MITTELSTAEDT: YOUR HONOR, I AM --
3 I'M SUGGESTING --

4 THE COURT: YES.

5 MR. MITTELSTAEDT: I AM INTENDING TO
6 SUGGEST THE OPPOSITE.

7 THE COURT: YEAH, OKAY.

8 MR. MITTELSTAEDT: I MEAN, IT WAS YOUR
9 HONOR WHO SAID -- AND I THINK WE SAID THIS IN OUR
10 CMC STATEMENT LAST TIME -- THAT THEIR DOCUMENT
11 REQUESTS WERE OVERBROAD, AND WHAT I'M SUGGESTING IS
12 WE COULD DO THIS THE OLD-FASHIONED WAY OF THE
13 DEFENDANTS FILING A WRITTEN RESPONSE AND THEN
14 MEETING AND CONFERRING AND TALKING WITH A
15 MAGISTRATE JUDGE.

16 WHAT I'M OFFERING TO DO IS TALK WITH THE
17 PLAINTIFFS NOW --

18 THE COURT: WHY WOULD THEY HAVE TO GO TO
19 A MAGISTRATE JUDGE? YOU'RE ALREADY PLANNING TO
20 OBJECT SO THEY HAVE TO FILE A MOTION TO COMPEL?

21 I DON'T -- I MEAN, I REALLY -- WHEN I WAS
22 READING THE CMC STATEMENT, FIRST OF ALL, I WASN'T
23 HAPPY THAT THE PLAINTIFFS AND LUCASFILM BASICALLY
24 FILED A WHOLE OTHER BRIEF ON THE MOTION TO DISMISS.

25 I'M GOING TO STRIKE THAT. I'M GOING TO

1 DISREGARD IT. I'M NOT GOING TO CONSIDER IT FOR
2 PURPOSES OF THE MOTION.

3 NEITHER SIDE, PLEASE DON'T EVER DO THAT
4 AGAIN. THAT'S IMPROPER.

5 BUT I DON'T WANT TO SEE GAMES ON THE
6 DISCOVERY. IT'S GREEN LIGHT. GO FORWARD.

7 MR. MITTELSTAEDT: OKAY.

8 MR. SAVERI: YOUR HONOR, CAN I JUMP IN?

9 THE COURT: YEAH.

10 MR. SAVERI: WE SERVED THOSE DOCUMENT
11 REQUESTS A LONG TIME AGO.

12 THE COURT: UM-HUM.

13 MR. SAVERI: I REALLY DON'T WANT TO GET
14 INTO SOMETHING WHERE WE SHOULD ASSUME WE'RE GOING
15 TO HAVE TO WAIT FOR OBJECTIONS AND GO THROUGH THAT
16 KIND OF PROCESS.

17 IF THE DEFENDANTS ARE NOW READY TO MEET
18 AND CONFER ON THOSE REQUESTS, I MEAN, WE'RE HAPPY
19 TO DO THAT.

20 I MEAN, I THINK WE SHOULD HAVE DONE IT A
21 LONG TIME AGO.

22 AND SO LET'S MEET AND CONFER. THAT'S
23 FINE. WE SHOULD HAVE DONE IT A LONG TIME AGO.

24 AND IF THAT'S WHAT MR. MITTELSTAEDT IS
25 SUGGESTING, I THINK IT'S A HAPPY DEVELOPMENT AND

1 LET'S GET THIS THING GOING.

2 WE HAVE A VERY AGGRESSIVE SCHEDULE, YOUR
3 HONOR, AND YOU HAVE SET DATES AND WE WANT TO MEET
4 THEM, AND SO IT'S IMPORTANT TO GET THE DISCOVERY
5 GOING.

6 SO I'D LIKE TO GET -- I'D LIKE TO DO
7 THAT.

8 MR. MITTELSTAEDT: IT SOUNDS LIKE WE'RE
9 IN AGREEMENT.

10 THE COURT: OKAY.

11 MR. SAVERI: SO LET'S MEET NEXT WEEK.

12 MR. MITTELSTAEDT: LET'S MEET TOMORROW.

13 MR. SAVERI: OKAY.

14 THE COURT: MEET TOMORROW. THAT'S GOOD.

15 MR. SAVERI: THAT'S FINE.

16 THE COURT: AND I'M GOING TO ASK THAT YOU
17 MEET IN PERSON AND SOMEONE BRING BAGELS AND
18 PASTRIES AND -- OKAY.

19 SO YOU'RE GOING TO MEET AND CONFER ON THE
20 DISCOVERY REQUESTS THAT HAVE ALREADY BEEN SERVED
21 TOMORROW.

22 MR. SAVERI: YEAH.

23 THE COURT: ALL RIGHT. I'M PUTTING THAT
24 IN MY CASE MANAGEMENT ORDER. OKAY.

25 AND I WOULD LIKE YOU TO MEET IN PERSON.

1 MR. SAVERI: THAT'S FINE. WE'RE NOT VERY
2 FAR FROM ONE ANOTHER, AND I'M HAPPY TO HOST.

3 THE COURT: OKAY. ALL RIGHT.

4 ALL RIGHT. SO YOU DON'T WANT ANY FORM OF
5 ALTERNATIVE DISPUTE RESOLUTION NOW, OR DO YOU?

6 UNDERSTANDING THAT THIS CASE IS GOING TO
7 SURVIVE A MOTION TO DISMISS, IS NOW AN APPROPRIATE
8 TIME, OR DO YOU NEED MORE DISCOVERY? OR WHAT WOULD
9 YOU LIKE IN TERMS OF ADR?

10 MR. SAVERI: YOUR HONOR, I GUESS I WOULD
11 SAY WE ARE ALWAYS WILLING TO TALK.

12 I WOULDN'T WANT TO DO ANYTHING THAT
13 DERAILS THE SCHEDULE.

14 THE COURT: UM-HUM.

15 MR. SAVERI: IF IT'S SOMETHING THAT THE
16 DEFENDANTS FEEL LIKE THEY WANT TO PURSUE OR TO TALK
17 ABOUT, EVEN IN THE MOST PRELIMINARY STAGE, I'M OPEN
18 TO THAT ALWAYS.

19 MR. MITTELSTAEDT: YOUR HONOR, WHEN WE
20 TALKED WITH THE PLAINTIFFS AND TALKED AMONG
21 OURSELVES, WE AGREED TO PUT IN THE CMC STATEMENT
22 THAT BOTH SIDES THOUGHT IT WAS PREMATURE.

23 THE COURT: OKAY.

24 MR. MITTELSTAEDT: SO I'M NOT PREPARED TO
25 TALK ON BEHALF OF EVERYBODY.

1 MR. SAVERI: AND, YOUR HONOR, THAT'S
2 FAIR. THAT'S COMPLETELY FAIR.

3 THE COURT: IS THERE -- I'M NOT ASKING
4 YOU TO COMMIT, BUT WOULD THERE BE A NATURAL POINT
5 WHERE IT WOULD MAKE SENSE TO EXPLORE THAT, AND WHAT
6 WOULD THAT POINT BE? OR POINTS?

7 MR. MITTELSTAEDT: I DON'T KNOW, YOUR
8 HONOR.

9 THE COURT: UM-HUM.

10 MR. MITTELSTAEDT: I'LL TELL YOU, I THINK
11 OUR VIEW IS THAT THE CLAIM THAT THESE BILATERAL
12 AGREEMENTS CAUSED ANY EFFECT ON COMPENSATION WHEN,
13 AS MR. RILEY WAS ARGUING, EVERYBODY WAS FREE TO
14 RECRUIT FROM EVERYBODY, EVERYBODY WAS FREE TO MAKE
15 COLD CALLS TO EVERYBODY, EXCEPT, UNDER THE
16 ALLEGATIONS OF THE COMPLAINT, WHERE THERE ARE BLACK
17 LINES.

18 AND SO ADOBE AND APPLE ALLEGEDLY HAD AN
19 AGREEMENT WHERE THEY WOULD NOT COLD CALL EACH
20 OTHER.

21 THE COURT: UM-HUM.

22 MR. MITTELSTAEDT: BUT IF YOU LOOK AT
23 THEIR CHART, ADOBE AND PIXAR HAD NO AGREEMENT
24 WHATSOEVER.

25 AND -- JUST A SECOND.

1 AND THEN, YOU KNOW, THEIR CLAIM IS, WELL,
2 IF SOMEBODY AT APPLE KNEW ABOUT THE AGREEMENT WITH
3 ADOBE AND KNEW ABOUT APPLE'S AGREEMENT WITH PIXAR,
4 THEREFORE, THAT MAKES FOR AN OVERALL CONSPIRACY
5 THAT ADOBE IS PART OF AND IT'S SOMEHOW NOW TIED TO
6 PIXAR, SOMEHOW NOW TIED TO LUCASFILM, I MEAN, THE
7 WAY WE LOOK AT THAT IS THE EXISTENCE OF THOSE
8 BILATERAL AGREEMENTS AS ALLEGED ARE REALLY GOOD
9 EVIDENCE THAT THERE'S NO OVERARCHING CONSPIRACY.

10 I MEAN, IF THE OVERARCHING CONSPIRACY WAS
11 NOBODY WOULD RECRUIT FROM ANYBODY --

12 THE COURT: UM-HUM.

13 MR. MITTELSTAEDT: -- WHY DO YOU HAVE
14 THIS HODGEPODGE OF BILATERAL AGREEMENTS, WHICH IS
15 ALL THAT THE D.O.J. ALLEGED, AND IT'S ALL THAT THE
16 PLAINTIFFS ALLEGE WITH ANY FACTS AT ALL.

17 AND, YOUR HONOR, JUST --

18 THE COURT: SO YOUR ANSWER IS THERE'S NO
19 TIME RIGHT NOW?

20 MR. MITTELSTAEDT: ABSOLUTELY.

21 THE COURT: OKAY. I GOT IT.

22 MR. MITTELSTAEDT: ABSOLUTELY. AND THERE
23 MAY NEVER BE.

24 THE COURT: ALL RIGHT.

25 MR. MITTELSTAEDT: AND THERE MAY NEVER

1 BE.

2 THE COURT: ALL RIGHT. I HEAR YOU.

3 MR. SAVERI: I TAKE BACK WHAT I SAID.

4 THE COURT: ALL RIGHT. LET ME -- I THINK
5 WE HAVE -- LET'S SET A FURTHER CMC. I THINK THAT
6 WOULD BE HELPFUL.

7 ARE YOU ALL AVAILABLE EITHER APRIL 18TH
8 OR APRIL 25TH?

9 MR. SAVERI: I HAVE A TRIAL THAT'S
10 SCHEDULED TO START THAT -- THE WEEK OF THE 23RD, I
11 THINK.

12 THE COURT: OKAY. COULD WE DO THE
13 18TH -- OH, DOES THAT MEAN YOU CAN'T COME ON THE
14 18TH?

15 MR. SAVERI: NO. THAT MEANS I CAN COME
16 ON THE 18TH, BUT I THINK I'M OUT OF POCKET ON THE
17 25TH.

18 THE COURT: OKAY. WHAT ABOUT FOR YOU?

19 MR. MITTELSTAEDT: THE 18TH IS FINE FOR
20 ME.

21 OKAY. THE 18TH IT IS.

22 THE COURT: THAT'S OKAY FOR EVERYBODY.

23 ALL RIGHT. THAT'S OUR FURTHER CMC.

24 THAT'LL BE APRIL 18TH AT 2:00 O'CLOCK.

25 ALL RIGHT. SO WE HAVE THIS ISSUE. THE

1 DEFENDANTS' DECLARATION IN SUPPORT OF THE MOTION TO
2 FILE UNDER SEAL IS DUE TODAY.

3 MR. SAVERI: I HAD A CONVERSATION WITH
4 MR. TUBACH BEFORE, BUT --

5 THE COURT: UH-HUH. IS THAT GOING TO BE
6 FILED TODAY, OR WHAT?

7 MR. SAVERI: NO. I THINK THAT YOUR
8 RULING --

9 MR. MITTELSTAEDT: YOUR HONOR, IF -- YOUR
10 RULING STRIKING THOSE SECTIONS OF THE CMC REALLY
11 TAKES CARE OF THIS.

12 CORRECT?

13 MR. SAVERI: THAT'S WHAT I THINK.

14 MR. MITTELSTAEDT: IF THOSE ARE STRUCK,
15 THERE'S NOTHING TO DISPUTE.

16 THE COURT: WELL, I THINK THIS ISSUE IS
17 GOING TO COME TO A HEAD BECAUSE YOU'RE PROBABLY
18 GOING TO WANT THAT FOR YOUR AMENDED COMPLAINT, THAT
19 INFORMATION.

20 MR. MITTELSTAEDT: AND, YOUR HONOR, IF I
21 COULD JUST, I THINK, GET TO THE BOTTOM OF THIS?

22 THE COURT: YEAH.

23 MR. MITTELSTAEDT: ALL THE PARTIES ARE
24 MEETING AND TALKING ABOUT THE DOCUMENTS THAT ARE
25 CITED IN THE CMC.

1 SOME OF US HAVE AGREED TO WITHDRAW
2 DESIGNATIONS.

3 OTHERS ARE STILL TALKING.

4 I THINK THIS IS GOING TO WORK OUT.

5 THE COURT: WHY DON'T WE DO THIS: I'M
6 NOT GOING TO STRIKE THE JOINT CASE MANAGEMENT
7 STATEMENT BECAUSE THAT SHOULD BE PART OF THE RECORD
8 SINCE IT WAS FILED.

9 I'M NOT CONSIDERING IT. I'M DISREGARDING
10 IT FOR PURPOSES OF THE PENDING MOTIONS TO DISMISS.

11 BUT I HAVE READ IT.

12 SO I STILL WANT YOU TO GO FORWARD AND DO
13 YOUR DEDESIGNATIONS, AND IF THERE'S ANYTHING THAT
14 YOU MAINTAIN SHOULD BE FILED UNDER SEAL, YOU'RE
15 GOING TO HAVE TO PROVIDE CASE LAW AUTHORITY FOR IT
16 AND A GOOD DECLARATION.

17 THE FACT THAT IT'S EMBARRASSING IS NOT
18 GOING TO BE SUFFICIENT.

19 MR. MITTELSTAEDT: UNDERSTOOD.

20 THE COURT: OKAY? ALL RIGHT. SO YOUR
21 DECLARATION IS DUE TODAY.

22 MR. MITTELSTAEDT: YES. AND I THINK I
23 CAN SAY, YOUR HONOR, THAT NO DEFENDANT IS INTENDING
24 TO FILE A DECLARATION.

25 THE COURT: OH, OKAY. SO THEN IT ALL CAN

1 THEN JUST BE FILED UNREDACTED?

2 MR. MITTELSTAEDT: YES.

3 THE COURT: OKAY. ALL RIGHT. THEN YOU
4 CAN JUST REFILE IT.

5 MR. SAVERI: YEAH. WE'LL FIGURE IT OUT.

6 I DON'T KNOW WHETHER THE RULE IS NOW THAT
7 IT AUTOMATICALLY GETS PUT IN THE PUBLIC RECORD OR
8 WE HAVE TO REFILE IT.

9 THE COURT: OKAY. WE'LL JUST DEAL WITH
10 IT -- WAIT UNTIL I GUESS --

11 MR. SAVERI: MIDNIGHT.

12 THE COURT: THEY HAVE UNTIL THE END OF
13 THE DAY. IF THEY DON'T DO IT --

14 MR. MITTELSTAEDT: WE'VE ADVISED HIM.

15 MR. SAVERI: YEAH, WE'LL FIGURE IT OUT.

16 THE COURT: ALL RIGHT.

17 IN THE FUTURE, IF YOU ARE GOING TO FILE
18 ANYTHING, THE -- LOOK AT MY STANDING ORDER AS TO
19 YOU HAVE TO FILE PUBLICLY A REDACTED VERSION
20 SIMULTANEOUSLY WITH ANY MOTION TO FILE UNDER SEAL.

21 MR. SAVERI: OKAY.

22 THE COURT: DO YOU UNDERSTAND?

23 MR. SAVERI: YEAH.

24 THE COURT: OKAY. SO IN THE FUTURE DO
25 THAT.

1 AND IF YOU ARE GOING TO FILE SOMETHING
2 WITH THE COURT, FOR THE COURT TO REVIEW, IF YOU ARE
3 GOING TO MAKE THAT MOTION, RATHER THAN HAVING IT BE
4 HIGHLIGHTED IN BLACK, HIGHLIGHT IT IN YELLOW, THE
5 VERSION THAT'S LODGED WITH THE COURT. THAT'S JUST
6 EASIER TO MAKE A DECISION ON THE MOTION.

7 MR. SAVERI: THAT'S FINE.

8 THE COURT: OKAY?

9 MR. SAVERI: THAT'S FINE.

10 THE COURT: WHAT OTHER ISSUE IS THERE?
11 IS THERE ANYTHING ELSE WITH REGARD TO ELECTRONIC
12 DISCOVERY OR ANYTHING ELSE?

13 MR. SAVERI: I THINK, FROM MY
14 PERSPECTIVE, WE'VE COVERED EVERYTHING THAT WAS KIND
15 OF ON OUR LIST.

16 THE COURT: OKAY.

17 MR. SAVERI: THERE MAY BE OTHER THINGS
18 THAT COME UP ONCE WE START DIGGING IN AND MEETING
19 AND CONFERRING, BUT AS OF TODAY, FROM MY
20 PERSPECTIVE AT LEAST, WE'RE UP-TO-DATE.

21 THE COURT: OKAY.

22 MR. MITTELSTAEDT: WE HAVE BEEN MEETING
23 AND CONFERRING ON AN ESI PROTOCOL, AND I THINK
24 PROGRESS IS BEING MADE.

25 THE COURT: OKAY. WELL, WE HAVE A TIGHT

1 SCHEDULE. FACT DISCOVERY CUT OFF -- WELL, WE HAVE
2 THE MOTION FOR CLASS CERT BEING FILED JUNE 28TH, SO
3 WE REALLY NEED DISCOVERY TO PROGRESS QUICKLY.

4 LET ME ASK, IF YOU ARE GIVEN LEAVE TO
5 AMEND YOUR COMPLAINT, HOW MUCH TIME DO YOU NEED TO
6 FILE A SECOND AMENDED CONSOLIDATED COMPLAINT?

7 MR. SAVERI: YOU KNOW, 30 DAYS SOUNDS
8 LIKE THE RIGHT AMOUNT OF TIME.

9 BEFORE WE -- I -- I WANT TO GO BACK TO
10 THE POINT YOU MADE JUST A SECOND BEFORE YOU ASKED
11 ME THAT QUESTION --

12 THE COURT: YEAH.

13 MR. SAVERI: -- WHICH IS I AM CONCERNED
14 ABOUT THE SCHEDULE, AND I'M -- I GUESS I'M LOOKING
15 FOR YOUR GUIDANCE, YOUR HONOR, ABOUT HOW WE CAN --
16 TO THE EXTENT THAT WE CAN NARROW AND FRAME ISSUES
17 WHERE THERE ARE DISPUTES THAT ARE HOLDING UP
18 DISCOVERY, I THINK IT WOULD BE GOOD FOR BOTH
19 PARTIES TO FIGURE OUT A WAY OF DOING THIS, GETTING
20 THEM RESOLVED ON AN EXPEDITED BASIS.

21 AND I'M NOT CLEAR, YOUR HONOR, WHETHER
22 THIS IS SOMETHING THAT WE SHOULD BE BRINGING UP
23 WITH THE MAGISTRATE JUDGE DIRECTLY PURSUANT TO HIS
24 RULES, OR IS IT SOMETHING THAT YOU, YOUR HONOR,
25 WOULD LIKE TO GET INVOLVED IN FROM A MANAGEMENT

1 PERSPECTIVE OR TO RESOLVE DISPUTES?

2 OR WHAT THE BEST WAY IS -- BECAUSE I
3 DON'T WANT IT TO LANGUISH AND FOR US TO SPEND A LOT
4 OF TIME UNNECESSARILY.

5 SO IF WE HAVE DISPUTES ABOUT THE SCOPE OF
6 DISCOVERY OR ESI, I'D LIKE TO FIGURE OUT A WAY OF
7 GETTING THESE SUBMITTED OR RESOLVED QUICKLY.

8 SO I AM ASKING FOR YOUR GUIDANCE ABOUT
9 WHETHER THIS IS SOMETHING WE SHOULD BE SUBMITTING
10 TO YOU, TO THE MAGISTRATE JUDGE, OR HOW YOU WISH --
11 HOW YOU WOULD LIKE US TO PROCEED.

12 THE COURT: WELL, I'D LIKE YOU TO HAVE NO
13 DISCOVERY DISPUTES.

14 MR. SAVERI: I UNDERSTAND THAT.

15 THE COURT: THAT'S WHAT I'M ORDERING.

16 MR. SAVERI: OKAY.

17 THE COURT: I'M ORDERING NO DISCOVERY
18 DISPUTES.

19 (LAUGHTER.)

20 MR. SAVERI: I'LL DO MY BEST TO FOLLOW
21 THAT.

22 THE COURT: WELL, I MEAN, WE COULD GO A
23 NUMBER OF WAYS ON THIS.

24 ONE, I CAN JUST HAVE YOU GO TO
25 JUDGE LLOYD --

1 MR. SAVERI: YOU KNOW, I DON'T KNOW IF
2 THIS IS GOING TO BE A PROBLEM, BUT IF WE HAVE SOME
3 ISSUE ABOUT WHETHER THE DISCOVERY IS DIFFERENT, YOU
4 KNOW, WITH RESPECT TO -- IF OUR CASE IS A BILATERAL
5 CASE OR AN OVERARCHING CONSPIRACY CASE OR ALL OF
6 THOSE SORTS OF THINGS THAT MIGHT HOLD UP THE
7 SCOPE --

8 THE COURT: YEAH.

9 MR. SAVERI: -- I'D REALLY LIKE TO GET,
10 IF WE COULD, THAT CLARIFIED QUICKLY AND NOT HOLD UP
11 THE PROCESS.

12 MR. MITTELSTAEDT: YOUR HONOR, I THINK WE
13 HAVE A COMMON INTEREST IN MOVING THINGS ALONG.

14 I THINK JUDGE LLOYD HAS SET UP A PRETTY
15 EXPEDITED SCHEDULE FOR BRINGING DISCOVERY DISPUTES
16 TO HIS ATTENTION.

17 MY SENSE IS WE OUGHT TO TRY THAT. IT
18 MIGHT BE FASTER TO GO TO JUDGE LLOYD THAN TO YOU.

19 THE OTHER APPROACH WOULD BE LET'S SEE IF
20 WE HAVE A DISPUTE AND WHAT IT IS AND, RATHER THAN
21 DECIDE THIS IN THE ABSTRACT, TAKE IT ISSUE BY ISSUE
22 IF THERE ARE DISPUTES.

23 MR. SAVERI: I DON'T WANT TO PREJUDGE
24 WHICH IS THE MOST EFFECTIVE WAY. I JUST WOULD LIKE
25 TO RAISE IT AND SEE IF WE CAN AGREE ON SOMETHING

1 NOW.

2 I AM CONCERNED, FROM TIME TO TIME, THAT
3 IF WE DO THINGS IN FRONT OF THE MAGISTRATE JUDGE,
4 ALL THAT MEANS IS WE HAVE ANOTHER ROUND OF BRIEFING
5 IN THE TRIAL COURT.

6 AND SO -- I'M WILLING TO TRY WHATEVER YOU
7 THINK OR THE DEFENDANTS THINK MAKE SENSE IN THE
8 FIRST INSTANCE.

9 THE COURT: WELL, EVEN IF IT DOES GO TO
10 JUDGE LLOYD, I DO MONITOR IT.

11 MR. SAVERI: OKAY.

12 THE COURT: AND IF I THINK THAT THERE IS
13 AN ABUSE, I WILL HAVE THAT RAISED BEFORE ME.

14 SO UNDERSTAND EVEN IF IT'S NOT HERE, I DO
15 SEE WHAT'S GOING ON.

16 MR. SAVERI: ONE THING THAT HAS WORKED
17 FOR ME IN OTHER CASES IS TO HAVE MORE FREQUENT CASE
18 MANAGEMENT CONFERENCES.

19 THE COURT: THAT'S FINE, TOO.

20 MR. SAVERI: I MEAN, I THINK, FOR
21 EXAMPLE, GIVEN THE SPEED WITH WHICH WE HAVE TO
22 WORK, IF WE PUT SOMETHING ON THE CALENDAR 30 DAYS
23 FROM NOW WHERE WE COME BACK AND REPORT ON DISCOVERY
24 AND OTHER THINGS, I THINK IT WOULD BE A WAY OF
25 MAKING SURE THIS THING MOVES ALONG.

1 THE COURT: YOU MEAN HAVING MORE FREQUENT
2 CMC'S?

3 MR. SAVERI: YES. AND I REALIZE THAT'S
4 IMPOSING ON YOUR CALENDAR, BUT I HAVE FOUND THAT
5 EFFECTIVE FROM TIME TO TIME.

6 THE COURT: I WOULD BE OKAY WITH THAT.

7 I'M JUST GOING TO BE DISPLEASED IF THERE
8 ARE A LOT OF DISCOVERY ISSUES ON THE --

9 MR. SAVERI: YOUR HONOR, MY EXPERIENCE IS
10 THAT IF WE HAVE FREQUENT ONES, THERE ARE -- IT'S
11 REMARKABLE HOW LITTLE IS IN DISPUTE.

12 THAT'S JUST MY SUGGESTION.

13 MR. MITTELSTAEDT: YOUR HONOR, I WOULD
14 SUGGEST THAT -- I DON'T WANT TO GO INTO THIS
15 THINKING WE'RE GOING TO HAVE DISPUTES, AND I THINK
16 WE OUGHT TO WORK THIS OUT AS BEST WE CAN AMONG
17 OURSELVES.

18 IF THERE IS A DISPUTE, AS I SAY,
19 JUDGE LLOYD HAS AN EXPEDITED PROCEDURE. WE SHOULD
20 DO THAT.

21 IF, WHEN YOUR HONOR SEES THAT, YOU THINK
22 WE NEED TO COME AND SEE YOU, THAT'S FINE.

23 CMC'S EVERY 30 DAYS SOUNDS A LITTLE
24 FREQUENT AND UNUSUAL TO ME, ALTHOUGH WE'D BE HAPPY
25 TO HAVE YOUR HONOR'S GUIDANCE WHENEVER.

1 THE COURT: WELL, YOU COULD ALSO JUST
2 TAKE IT OFF CALENDAR IF THERE'S REALLY NOTHING TO
3 TALK ABOUT, AND YOU COULD APPEAR BY PHONE IF YOU
4 WANTED TO AS WELL.

5 MR. SAVERI: I THINK THAT'S AN EFFECTIVE
6 WAY TO PROCEED. IT'S WORKED FOR ME IN OTHER CASES.

7 THE COURT: WHAT DO WE HAVE,
8 MS. PARKER-BROWN, FOR MAYBE MARCH?

9 WE'LL HAVE YOU COME IN SOONER. I MEAN, I
10 THINK EVERY 30 DAYS IS PROBABLY TOO MUCH, BUT IF
11 YOU WANTED TO DO EVERY OTHER MONTH, THAT WOULD BE
12 OKAY.

13 MR. MITTELSTAEDT: YOUR HONOR, COULD I
14 SUGGEST THAT IF THEY'RE GOING TO TAKE -- IF YOUR
15 HONOR DOES ORDER AN AMENDED COMPLAINT AND THEY'RE
16 GOING TO TAKE 30 DAYS TO DO THAT, THEN PERHAPS WE
17 SHOULD HAVE THE FIRST CMC 15 OR 30 DAYS AFTER WE
18 GET THEIR AMENDED COMPLAINT.

19 THE COURT: THAT MAKES SENSE. THAT MAKES
20 SENSE.

21 THE CLERK: DO YOU WANT TO KEEP THE
22 MARCH 18TH? OR IS THAT TOO SOON? I MEAN
23 APRIL 18TH.

24 THE COURT: WHY DON'T WE -- YEAH, WE CAN
25 KEEP THE APRIL 18TH DATE.

1 WHY DON'T WE KEEP THE APRIL 18TH DATE AND
2 JUST -- I MEAN, IF -- I WILL JUST TELL YOU, IF IT
3 TURNS OUT THAT THERE ARE A LOT OF DISCOVERY
4 DISPUTES, THEN WHAT I HAVE REQUIRED IN OTHER CASES
5 IS THAT THE LAWYERS COME IN AND MEET IN MY JURY
6 ROOM FOR AN HOUR AND THEN THEY MEET WITH ME AND
7 THEN I JUST, BOOM, BOOM, BOOM, MAKE A DECISION ON
8 ALL THE DISCOVERY MOTIONS.

9 AND I HOPE IT DOESN'T GET TO THAT, BUT I
10 CAN DO THAT IF IT BECOMES JUST, YOU KNOW, TOO MUCH.

11 I ALSO DON'T WANT TO OVERWHELM
12 JUDGE LLOYD WITH TONS AND TONS AND TONS OF
13 DISCOVERY DISPUTES.

14 SO IF THAT BECOMES AN ISSUE, THAT'S WHAT
15 WE'RE GOING TO DO. I'M GOING TO REQUIRE EVERYONE
16 TO COME IN, YOU'LL MEET IN MY JURY ROOM FOR AN
17 HOUR, AND THEN YOU'LL MEET WITH ME AND I'LL JUST
18 RULE ON WHATEVER IT IS.

19 IT'LL BE TWO PAGES MAXIMUM FOR ANY
20 DISCOVERY MOTION, NO REPLY, OPPOSITION DUE IN SEVEN
21 DAYS.

22 SO LET'S HOPE IT DOESN'T GET TO THAT.
23 THAT'S WHAT I -- I'M NOT GOING TO ORDER THAT AT
24 THIS POINT.

25 BUT IF IT TURNS OUT THAT THERE'S NOT A

1 LOT OF COOPERATION AND THERE'S A LOT OF
2 OBSTRUCTION, THAT'S WHAT'S GOING TO HAPPEN.

3 OKAY?

4 MR. SAVERI: THAT'S FINE, YOUR HONOR.
5 THANK YOU.

6 THE COURT: OKAY. I THINK THAT'S IT
7 THEN. ALL RIGHT?

8 MR. SAVERI: YES.

9 MR. MITTELSTAEDT: THANK YOU, YOUR HONOR.

10 THE COURT: OKAY. THANK YOU.

11 MR. SAVERI: THANK YOU, YOUR HONOR.

12 (WHEREUPON, THE PROCEEDINGS IN THIS
13 MATTER WERE CONCLUDED.)
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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

/s/

LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595